89-1249

Supreme Court, U.S.
FILED
FEB 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LOUIS VITALE AND GRACE VITALE

PETITIONERS,

v.

CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO AND EILEEN I. RUOTOLO AND EARL I. WILLIAMS

RESPONDENTS,

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. THE FEDERAL QUESTIONS HEREIN HAVE BEEN DECIDED BELOW IN A WAY WHICH IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT:

A. WITH THE "SOVEREIGN IMMUNITY" OF THE STATE OF CONNECTICUT UNDER THE ELEVENTH AMENDMENT.

B. FAILURE TO STATE A CLAIM

1. PETITIONER GRACE VITALE

2. PETITIONER LOUIS VITALE

C. STATUTE OF LIMITATION

D. CONSPIRACY

E. 42 U.S.C.A. § 1983

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LIST OF PARTIES

All the parties in the United States Court of Appeals for the Second Circuit are all listed in the caption.

OPINION BELOW

The opinion of the United States District Court. (App A, infra, pps.A-36,57) is not reported.

The opinion of the United States Court of Appeals for the 2nd Circuit, (App A, infra, pps. A-59,64) is not to be reported or used in any other case or courts.

JURISDICTION

The jurisdiction of United States District Court was invoked under Title 28 U.S.C. § 1343 (Am. Compl. App A, First Count par. 10, p.A-4). Judgment of said court entered Jan. 4, 1989. (App A, infra, p.A-57). The appeal was filed on Jan. 26, 1989. (App A, infra, p.A-58) to the United States Court of Appeals for the 2nd Circuit. Motion for Extension of Time for Re-hearing filed August 28, 1989, granted Sept. 11, 1989. (App A, infra, p.A-65) Motion for Rehearing filed Oct. 2, 1989 and denied Nov.

20, 1989. (App,A, p.A-66).

The jurisdiction of the Supreme Court of the United States was invoked under Title 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. First Amendment to the United States Constitution provides in relevant part: (App.B, p.A-67).

2. Fourth Amendment to the United States Constitution provides in relevant part: (App.B p.A-67).

3. Eighth Amendment to the United States Constitution provides in relevant part: (App.B, p.A-67).

4. Fourteenth Amendment to the United States Constitution provides in relevants part: (App.B, pps.A-67,68).

5. Civil Rigts Act, Title 42 U.S.C.A. § 1983 provides in relevant part: (App.B, p.A-68).

6. Civil Rights Act, Title 42 U.S.C.A. § 1985(3) provides in relevant part: (App.B, p.A-68).

7. Under § 1, Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part: (App.B, p. A-68).

8. Under § 3, Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part: (App.B, p. A-68).

9. Under § 8f, Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part: (App.B, p. A-69).

10. Under § 12(b)(6), Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part: (App.B, p. A-69).

11. Under § 18, Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part: (App.B, p. A-69).

12. Conn. Gen. Stat. § 52-577 provides in relevant part: (App.B, pps. A-69,70).

13. Conn. Gen. Stat. § 52-565 provides in relevant part: (App.B, p. A-70).

14. Conn. Gen. Stat. § 54-63c-d, provides in relevant part: (App.B, p. A-70).

15. Conn. Gen. Stat. § 54-41r, provides in relevant part: (App.B, p. A-70).

STATEMENT OF THE CASE

Petitioners, proceeding pro se by necessity, brought this action alleging various violation of our constitutional rights in connection with respondent Louis Vitale's false arrest, false imprisonment and malicious prosection, (App A, First Count, paras. 1, 9-10 pp. A1-A2). The named defendants, city and state employees or agents filed Motion to Dismiss the respondents complaint for failure to allege sufficient facts in which relief could be granted in the United States District Court in New Haven. (App. A, First Count, paras. 2-7 pp. A1-A2).

The petitioners is petitioning for a writ of certiorari following the affirmance by the 2nd Circuit of Appeals on a ruling by Judge E.B. Burns of the United States District Court of Connecticut which granted a Motion to Dismiss filed by defendants' City of New Haven, Peter Durante, Louis Daniels, Joseph Toscano, Eileen M. Ruotolo and Earl I. Williams.

The pertinent facts alleged in the complaint are as follows. Petitioners were in the wholesale grocery business selling to retail Stores.

Mr. Rodriguez owned store dba Rodriguez Market, New Haven. Rodriguez purchased groceries from the petitioners.

On June 30, 1982, said petitioner was hired by Mrs. Elizabeth Rodriguz to manage all her properties. The firat floor tenant residing at 9-11 Hurlburt Street, New Haven, tore open a sewer line without permission to drain out the water from the washing machine into the sewer. The tenant failure to connect the hose line, properly in the sewer pipe caused all the flushings from the toilets to discharge into the cellar. The smell from the cellar became unbearable that the tenant filed a complaint with the respondent Durante, Enforcement and Inspection of the Housing Code for the City of New Haven. He sent Inspector McBride to inspect the property and cited Mrs. Rodriguez for 9 violations that needed to be corrected. During the period petitioner was correcting the violations, I was constantly complaining to the inspector concerning the continuing damages by the tenants, which he failed to listen. Instead, he continued to harass me

that I made several complaints to respondent Durante. He refused to listen, that on March 31, I quit my position as agent for service. On May 2, 1983, petitioner received a letter from the prosecutor Joseph Clark of the Housing Court that he had an application for my arrest for violations of the housing code and to appear at his office on May 5, 1983 to discuss the matter. As soon as I received this notice from the prosecutor, I wrote all the tenants, respondent Durante and the prosecutor that I quit my job working for Mrs. Rodriguez as management of her properties. The prosecutor withdrew the application for my arrest.

On May 20, 1983, petitioner received a second letter from a prosecutor David Gold of the Housing Court that an application for my arrest and that I come to his office to discuss the housing code violation, May 26, 1983. I wrote a second letter on May 21, 1983 to respondent Durante and told him that I do not own the properties, do not work for Mrs. Rodriguez anymore. I warned him not to arrest me or I would sue him for false arrest. He fail

to heed my advice and proceeded to have petitioner arrested for 39 Housing Codes violations and had it published in the New Haven Journal Courier to embarass and humiliate me.

The petitioner filed a Motion to Dismiss the case which arguments were held on November 17, 1983. The case against the petitioner was dismissed on November 30, 1983. (App. A, Second Count, paras. 1-31, 35 p.A-9)

On October 20, 1983, the landlords was holding a meeting which Mayor DeLieto and his cabinet members were invited to attend because this was an election year for the Mayor's Office for the City of New Haven. Petitioner asked the respondent Durante many questions concerning hi. policy with the application of the Housing Code against the landlords. I accused him that he had a double standard and that his inspectors were encouraging the tenants to do damages to the apartments to withhold rent payments from the landlords. These embarassing questions caused him to tell prosecutor Gold to get a conviction against me in the Housing case and put me in jail. His failure led him

to continue his harassment against the petitioner.in violation of my rights and privileges of freedom of speech. (App. A, Third Count, paras. 4-8 p. A-14).

On May 28, 1983, respondent Toscano made a telephone call to LBG Distributors, Inc. requesting grocery invoices for Agron Market, 113 Putnam Street, New Haven and what connection that I may have with Mr. Rodriguez because my name appear in various deals. He was told that he would have to speak with Mr. Vitale because he did not know. He left his telephone number and tell him to return the call. I return his call the same day and we have a 30 minute discussion and he asked me were to sent the subpeona. The next day I picked up the subpeona when he told me that the prosecutor didn't intent to use me as a state witness because I did not have any information in which to convict Mr. Rodriguez for attempt arson. Shortly thereafter, I received a telephone call from respondent Attorney Earl Williams, who was defending Rodriguez in the arson trial. We met and talked on the telephone many times to

discuss all matters pertaining to his business affairs. On June 6, 1983, I testified for several days and I was never warned or accused of lying during the entire time that I was in the witness box by the judge. During this time I discovered that respondent taped the telephone conversation without permission. As soon as I finished testifying I left the courthouse and did not hear from anyone again about the trial. (App. A, Fourth Count, paras. 16-18 p. A-13).

In furtherance of his conspiracy, respondent Durante was able to obtain the services of respondents Toscano, Ruotolo and Daniels to railroad the petitioner Louis Vitale to jail. On December 14, 1983, respondent Toscano obtained a warrant for my arrest for perjury in violation of § 53a-156. On December 16, 1983, I received a telephone call fron Detective DeNuzzo to report to the Firehouse, Olive Street, New Haven because he had a warrant for my arrest for committing perjury during Rodriguez trial for arson. Petitioner picked up a bank check in the name of the New Haven Police Department, plus 450.00 in cash or more and went

to the Firehouse to meet Detective DeNuzzo but he was not there. Instead I met with the Fire Marshal, who escorted me to the Police Station, Union Avenue, New Haven to be booked. The booking took about 30 minutes and than I was placed in a cell for 5 hours. At no time was I permitted to make bail or contact my family, friends or attorney. During my release, respondent Daniels shouted to Sargeant Eagan that the warrant was unsigned what shall he do. Eagan told him to sign Toscano's name to the warrant, which he signed in my present. When I signed the paper for my release, the officer told me to appear in court Monday, December 19, 1983. I bitterly protest and told the officer that I was leaving for a Hawaii vacation and could not appear on Monday. The officer refused to changed the date. Petitioner retained respondent Williams to defend me in the perjury case. (App. A, Fifth Count, paras. 8-27 pps.

That respondent Daniels forgery of the warrant is a violation of the criminal and civil law makes him liable for all or part of the injuries suffered by the petitioners. (App. A.

Sixth Count, paras. 7-12 pps. A-19,20).

Respondent Eileen Ruotolo worked as a clerk and Notary Republic in the office of the State Attorney. She certified that the respondent Joseph Toscano signed and acknowledge the allegations in the affidavit in the arrest warrant against the petitioner Louis Vitale. She knew that he did not sign the affidavit at all and that she was violating the criminal and civil statute. That her certification of the affidavit in the warrant made her liable to the petitioners for the injuries and damages suffered by the petitioners. (App. A, Seventh Count, paras. 7-15 pps. A-20,21).

On January 5, 1984, petitioner Louis Vitale met with respondent Earl Williams in his office to discuss his handling of the felony charge of perjury. He told me that there would be no attorney's fee because he knew I was being frame. I told him to obtain a copy of the warrant it was forged by respondent officer Daniels. I told him to investigate all the respondents, copy of the transcript and telephone because the allegations in the affidavit were

false. On many occasion when we went to court and chauffeuring him to various courts, airports and state prison, I would ask him if he obtain the important evident which would end this criminal action. He made no effort to obtain the officer name who forged the affidavit in the warrant and the telephone tape. He did get the warrant and the transcript which I zerox a copy of it. Since he refused to follow my instruction, I decided to write letters to the Chief of Police and Sargeant Bereton on several occasion when I received a letter from Commander Cruz, Internal Affairs Unit which he supplied me the name of the officer. I wrote to Judge Quinn asking who signed his name to the warrant. He never answered the letter. I wrote to Chief State Attorney McGuigan and he refused to act against the respondents Toscano, Ruòtolo and Daniels for forgery. I told respondent Williams to file papers to end this case against me but he refused to follow my instruction so I told him to file a withdrawal of his appearance from the case and return the file. He never file his withdrawal slip and continue

to conspire with the prosecutor's office to embarrass and humiliate me. I filed a Motion to Dismiss which was never heard. On July 1, 1985, I was to appear before Judge Murray to begin the trial. Instead I was referred to the Court Consultation Clinic for a competency evaluation whether I knew the nature of the serious charge of perjury and whether I could understand the proceeding or assist or defend myself in a long criminal trial. Under the direction of all the respondents to undergo a competency test without my permission. That the trial held on September 9, 1985, was nothing more than a kangaroo trial with all the respondents and judge who was a former employee in the prosecutor's office being tried in a B Court, The case was dismiss. That this final act was to embarrass, humiliate and degrade the petitioner. (App. A, Eighth Count, paras. 12-50 pps. A-22-29).

Petitioner Grace Vitale met with respondent Earl Williams to discuss the loan he requested from my husband for $1000.00 to start up a client fund. I agreed to loan him the money with the proviso that he agreed to represent

plaintiff Angelo Vitale and me in the malpractice lawsuit against Attorney Benson Snaider known as L. Vitale, et al v. Snaider, et al. Docket No. CV-85-0241362, Superior Court, Judicial District of New Haven at New Haven. He agreed to handle the matter and took the file from my husband. Than I loaned him the $1000.00. When the case case was assigned to be tried, he wrote me a letter that he would withdraw from the case unless we agreed to postpone the trial and pay him an additional five thousand (5) dollars for legal fees depositions from police officer, plaintiffs, defendant and the girl involved in the accident. We refused because he knew he could do all of this on examinations and cross examinations of all the parties he wanted to appear to testify. His ridiculous demand for this large payment was an excuse to refuse to represent Angelo Vitale and me. (App. A, Ninth Count, paras. 1-6 pp.A-30,31).

There has never been a witness in either a criminal or civil trial in the state or nation arrested and charge with perjury.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL QUESTIONS HEREIN HAVE BEEN DECIDED BELOW IN A WAY WHICH IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. With The "Sovereign Immunity" Of The State Of Connecticut Under The Eleventh Amendment

Respondents Joseph Toscano and Eileen Ruotolo, employees of the State of Connecticut (App.A, First Count, paras. 5 & 6, p. 2a) and they claim that petitioners suing them in their official capacity are suing the State of Connecticut. It claims that under the "sovereign immunity" of the Eleventh Amendment they can not be sued without their permission. This claim was true until Congress enacted the Civil Rights Act, Title 42 U.S.C.A. §§ 1983, 1985 (3) and 1986 and the Supreme Court in a half-dozen decisions on the government's liability to its citizens, the court lowered or abliterated centuries-old "sovereign immunity" barriers to enforce civil rights violations from government's and municipal's employees or agents. See Robertson v. Wegmann, 436 U.S. 584 591, 98 S.Ct 1991, 1996, 36 L.Ed2d 554 (1978),

the Supreme Court held:

> "Title 42 U.S.C.A. § 1983 abrogated the Eleven Amendment "sovereign immunity" of states to the extent necessary to provide full relief including conpensation for persons injured by a deprivation of federal protective rights and the prevention of abuse of power by those acting under color of law."

The Fourteenth Amendment to the United States Constitution provides in relevant part: (App.B, para.4,p.A-67); and the Civil Rights Act 42 U.S.C.A. § 1983, provides in relevant part: (App.B,para.5 p.A-68). The claims of the respondents Toscano and Ruotolo is in conflict with the Supreme Court decision, supra and § 1983 that they are immune from being sued under the Eleventh Amendment. The only persons that need permission are those that want to sue for any other reason.

B. Failure To State A Claim

1. Petitioner Grace Vitale

Petitioner claims that Judge Burn's Ruling on defendants' motion to dismiss, the judges that affirmed and respondents supporting her decision did not address the loan made to Williams. (App.A,Ninth Count,pp.A-30-31) and the

violation of my constitutional protective rights by these respondents callous and reckless indeference in framing my husband for a charge of perjury. (App.A,Eighth Count,para.35,pp.A-26-27,Eleventh Count,para.17,p.A-33). In furthering their conspiracy to railroad him to prison, with enough bail money in his pocket to be released immediately, (App.A,Fifth Count, paras.14-15,p.A-16) refuse to allow him to contact me for five hours which had a mental and emotional strain worrying where he was. (App.A, Fifth Count,paras.18-20,pp.A-16-17). In violations of the Eighth Amendment, (App.B,para.3, p.A-67), they proceeded to extent their cruel and unusual punishment by serving the warrant two days before we were to leave for Hawaii vacation, immediate court date, prior to Christmas and New Year Holiday to ponder the perjury charge penalty of five years or $5000.00 or both during our vacation and the determination of the dismissal of the criminal charge. (App. A,Fifth Count,paras.24-29,pp.A-17-18). Finally, the kangaroo trial conducted by a judge, a former employee of the State Attorney's Office,

Court Consultation Clinic and respondent Earl Williams held a kangaroo hearing to refer him to a degrading competency hearing against his permission. (App.A,paras.39,41-50,p.A-27-29). See Webster's Tird New International Dictionary (1971), id at 1876, accord, Randon House College Dictionary 1091 (rev ed) 1980) held:

> "these defendants conspired with each other to convict and railroad the plaintiff, especially to prison with undue haste and usually by the use of false charges and insufficient evidences."

These overt acts violated the Eighth Amendment. The basic purpose of a § 1983 damage award is to compensate persons injured caused by a deprivation of a constitutional rights. Carey v. Piphus, 435 U.S. 247 (1978). The Supreme Court also stated that compensation, exemplary and punitive damages are also available for mental and emotional distress. See Harris v. Harvey, 605 F.2d 330 (1979); Smith v. Wade, 461 U.S. 30 (1983).

2. Petitioner Louis Vitale

Judge Burn's ruling on defendants motion to dismiss plaintiffs' complaint, distorted the

facts and laws that it does not state a claim for false arrest, false imprisonment and malicious prosecution. Her hodgepodge of non-application of cases, misinterpretation of the laws and criticism of the complaint which was follow by using the same form book Civ.R. Form 2, Civil Rights "unlawful arrest" 5 Am. Jur. Pl. and Pr. Forms (rev. ed), paras. 1-5,9;11,19 p-ps. 856-857 and Civ.R. Form 136, Civil Rights Act "Conspiracy to deprive plaintiff of his civil rights" 22 Am. Jur. Pl. and Pr. Forms (Rev). That her ruling conflicts with § 8f, 28 U.S.C. "that the complaint should be construe to do substatial justice." Starks v. Perloffs, 760 F2d 52 (1985).

That there has never been a witness in a criminal or civil trial in this state or the United States except one person for perjury. The only reason Shaw was arrested which is similar to this case because the prosecutor as these respondents became vindictive for one reason or another. Garrision v. Shaw, 328 F.Supp. 190 (1972) the Court held that others have lied on the stand and he was being selectively

prosecuted and dismissed the case against Shaw.

Petitioner complaint does state a claim against Durante false arrest when he had me arrested for 39 housing code violation on June 14, 1983 without probable cause and malice. On November 30, 1983 the case was dismissed. (App. A,Second,para.31,p.A-9). Toscano, Ruotolo, Durante and Daniels conspiracy which led to my second arrest for perjury on December 16, 1983 by a defective and illegal warrant and on September 9, 1985 when the perjury charge was dismissed state a claim against them. Whether or not it was good or defective, a judicial issuance of a warrant does not insulate police from liability to the person injured. Briggs v. Malley, 748 F.2d 715 (1st Cir.1984).

The complaint states a claim for false imprisonment against the same four respondents. As to these respondents claims, that "the warrant was valid on its face" the court in Ross v. Village of Wopping Falls, 62 AD2d 892, 406 NYS 2d 506 (2d Dept.1978), stated:

> "there is no justification for an arrest under a warrant apparently valid on its face where the arresting officer who has

himself procured the warrant by his own knowingly false statement."

In Boag v. Johnson,470 F.2d 512 (1972) the appeal court stated:

"A complaint in a civil rights action against police officers who participated in plaintiff's arrest, detention and questioning and allegedly violated his constitutional rights states a claim in which relief can be granted."

In Mayer v. Nebraska, 262 U.S. 399, 43 S.Ct 625, 67 L.Ed 1042 (1963) the Supreme Court:

"other circuit courts, also have cases recognizing § 1983 jurisdiction where there was little more than an unlawful arrest."

See: K-mart, No 4195, 559 F.2d 1274 (5th Cir. 1977); Beightol v. Kunowski, 486 F.2d 293 (3rd Cir.1973); Giordano v. Lee, 434 F.2d 1227 (8th Cir.1970); Joseph v. Rowlen, 402 F.2d 367 (7th Cir.1968); Nesmith v. Alford, 318 F.2d 110 (5th Cir.1963); and cf. Cohen v. Norris, 300 F.2d 24,30-31 (9th Cir.1962)..

- Lessman v. McCormick, 591 F.2d 605,609-10 (1979) the court of appeals stated:

"the concept of liberty guaranteed by the Fourteenth Amendment denotes freedom of bodily-restraint and whenever a person unlawfully obstruct or deprive another of his freedom, he will be liable for

that interference."

The complaint states a claim for the tort of malicious prosecution is to protect the personal interest from unjustifiable litigations and the perversion of proper legal procedures.

Respondent City of New Haven under Monnell v. Deparment of Social Services, 436 U.S. 658 (1978) claims, "a municpality may be sued for damages § 1983 only were the constitutional violations have been committed pursuant to an official policy or custom." No such policy or custom is alleged by the plaintiff in the present case. The respondents complairt is suing the city because it is responsible for all the illegal conduct carried out by their employees or agents which violates the constitutional rights of another person. (App.A,First Count, paras.2-4,pps.A-1-2).

C. Statute Of Limitation

When Congress has not explicitly provided a time limitation, the courts will look to state law for an appropriate time limit. The federal court in this action applied the Connecticut's three-year general tort statute, § 52-577(1987)

This statute contains two subsection that they applied Section a which provides in relevant part; (App.B, para.12a,p.A-69). When a federal court barrows a state statute of limitations, generally, also barrows related provisions pertaining to the tolling of the act to sue. William v. Walsh, 558 F.2d 667 (2d Cir.1977). As usual, Judge Burns has accept claims or construe the petitioners' complaint in the light most favorable to the respondents. She applied the day the overt tort began, under § 52-577a is applicable to all torts except false arrest false imprisonment and malicious prosection which the tolling of the overt tort does not start until the criminal charge is disposed of by the court. (App.B, para.12b,p.A-69). Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (1975) the court stated:

> "overly restricted reading of the complaint as narrowly as possible and drew every inferences adverse to the plaintiffs' claim is inconsistent with the mandate that the pleading shall be construed to do substantial justice." Fed.R.Civ.P. 8f, 28 U.S.C.A.

D. Conspiracy

A "civil conspiracy" is a concerted action

among two or more parties in a commission of a injury whereby one may act for the others and they all will be bound. Hampton v. Hanrahan, 600 F.2d 600,630 (7th Cir.1979), rev'd in part on other grounds, 446 U.S. 754, 100 S. Ct. 1987, 64 L.Ed2d 670 (1980); Prosser, Law of Torts, 2d,pp.234-235 (1955). In a conspiracy, damages flow from the overt acts and not from the conspiracy. A plaintiff charging violation of his civil rights by a conspiracy. In what other way can plaintiff plead conspiracy? Certainly he is not required to list the place and date of defendants' meetings and the summary of their conversation. He should not be required here to plead his evidences. Hoffman v. Halden, 268 F.2d 280 at p.294-95; Bready v. Geist, 83 F.R.D. 432 (1979); and Ruyan v. United Bhd of Carpenters, 566 F.Supp 600 (D.C.Colo-1983); 42 U.S.C.A. § 1983. In a civil rights conspiracy case, injury and damages must flow from the overt act. What were the overt acts alleged in the complaint that Judge Burns of the U.S.D.C, Judge Miner, Altamari and Gray U. S.C.A. and respondents in which they all claim

that the complaint fail to allege enough overt acts to support a conspiracy among them.

The gravamen of these two criminal actions was to railroad the petitioner to jail. Webster, supra. These overt acts were more than sufficient and they are: a) illegal taping; b) embarrassment at the landlords' meeting; c) illegal warrant; d) forgery; e) perjury; f) illegal 5 hour confinement (App.B, para.14,p.A-70); g) harrassment; h) Court Consultation Clinic. They could be sued under Conn. Gen. Stat. § 52-565. (App.B,para.13,p.A-70).

E. 42 U.S.C.A. § 1983

Since the judgment below was premised on Fed. R.Civ.P. 12(b)(6), (App.B,para.10,p.A-69); See Conley v. Gibson, 355 U.S. 41,45-46, 78 S.Ct. 99,101-102, 2 L.Ed2d 80 (1957). In passing on the motion to dismiss, the allegations of the complaint must be construed in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232,236, 94 S.Ct 1683,1686, 40 L.Ed2d 90 (1974); and must consider all facts to be true. Jenkins v. McKeithen, 395 U.S. 411,421-22 (1969); and in the light most favorable to the plaintiff.

Camerio v. Beatrice Foods Co., 595 F.Supp 918, 920 (1984). The Fourteen Amendment provides in relevant part: (App.B,para.2p.A,p.A-67); and 42 U.S.C.A. § 1983 provides in relevant part: (App.B,para.5,p.A-68); (App.A,First Count,para. 8,p.A-1 and Fifth Count,para.31,p.A-19; Eight Count,paras.51-52,p.A-29-30; Eleventh Count, paras.8,14-16,pp.A-31-32).

In order to allege a good cause of action, plaintiff must charge first that the conduct complain of have deprived him of a constitutionally-protected rights; and second, that the conduct was fairly attributable to the state. Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed2d 482 (1982) the court proceeded to outline a standard for determinig the presence of state action, and accordingly, propose a two-pronged approach to "fair attribution."

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible
>
> .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

In other words, to establish a deprivation of a federally-protected right there must be both "state action" and "state actor." This action meets the Lugar test because Judge Murray, Toscano and Ruotolo are state employees or agents. (App.A,paras.5-6,p.A-2).

In Tower v. Glover, 104 S.Ct. 2820 (1984), the Supreme Court set forth the third requirement "under color" of state law. Justice O'Connor held that: a) the complaint adequately alleged conduct "under color of" state law in view of the conspiracy allegations, and private attorney have never enjoyed immunity from liability for intentional misconduct. Id 2822. A private persons acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of a federal rights. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct.183, 66 L.Ed2d 185. Id p.2824: Title 42 U.S.C. § 1983 provides in relevant part that:

> "(e)very person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages."

The petitioners' complaint has met the city

and state test responsibilities in Lugar as to "state actor" and "state action" and "under color of" state law in Tower. (App.A, Fifth Count, para. 10, A-9 and Eleventh Count, paras. 8, 14, 16, pps. A-20, 21).

1. Peter Durante and Louis Daniels

Their claims for false arrest, false imprisonment and malicious prosecution that serving them the complaint on January 8, 1987 and not on November 17, 1986 with the court is time-barred must fail. See Sullivan v. Choquette, 420 F.2d 674, cert. denied 398 U.S. 904, 90 S. Ct. 1691, 26 L.Ed2d 62 (1970); (App.B, para. 8, p. A-68).

See Munson v. Jenklow, (D.C.S.D. 1976) 421 F. Supp 544, judgment affirmed (C.A.8th Cir.1977) 563 F.2d 933, the court of appeals held:

> "a civil rights complaint filed against the city, its officials, agents and employees set forth sufficient facts to support its general allegations of unconstitutional government interference with plaintiffs lawful activities, and provides defendants sufficient notice of the claim which they will be called upon to defend."

See DiMaggio v. O'Brien, 497 F.Supp. 870 (1980).

2. Earl I. Williams

Judge Burns, U.S.D.C. and Judges Miner, Altmari and Gray that affirmed her ruling on defendant's motion to dismiss is in conflict with other district courts, appeals courts and decisions of this court. Petitioners do not show that his action was attributed to the state, as a private person act "under color of" state law in a conspiracy with a state officials to deprive another rights. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed2d 185. Barristers have never enjoyed immunity from tort liability for intentional misconduct. Tower v. Glover, 104 S.Ct. at 2822. See Cameron v. Fogarty, (C.A.2d Cir.1983) 705 F.2d 676, the court of appeals, held:

> "pro se complaint alleging, inter alia, that his attorney conspired with a judge and counsel in denying him his rights to adequate legal representation and fair trial adequately alleged the denial of his rights based on "state action" for the purposes of § 1983.

See Frankos v. LaVallee, (C.A.2d 1976) 535 F. 2d 1346, cert. denied, 97 S.Ct. 310, 429 U.S. 918, 50 L.Ed2d 284. (App.A,Eighth Count,paras. 19-49,pp.A-16-18). She also fail to address

or mention the claims of Louis Vitale in the Tenth Count of the complaint in her decision.

Finally, the appeals court did not support its own decision based upon the footnote in order to circumvent the conflicts in all the federal courts, which states the following:

> "N.B. This summary judgment will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

By _____
Louis Vitale
162 Standish Ave
North Haven, Conn.
06473
(203) 239-3430

By _____
Grace Vitale
162 Standish Ave
North Haven, Conn.
06473
(203) 239-3430

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : N-86-400 (EBB)

VS. :

CITY OF NEW HAVEN, ET AL : JANUARY 23, 1987

AMENDED COMPLAINT

FIRST COUNT (as to all defendants)

1. Plaintiffs Louis and Grace Vitale are citizens of the United States of America, a residence of the Town of North Haven, County of New Haven, State of Connecticut.

2. Defendant City of New Haven, a municipal corporation organized and existing under and by virtue of the laws of the State of Connecticut, is situated in the County of New Haven and was the employer of the defendants Peter Durante and Louis Daniels. The individual defendant, and each of them, performed all the herein acts for and in the name of defendant City of New Haven.

3. Defendant Peter Durante, is now, and at all times material hereto, was duly appointed employed and acting as Director of Inspection

and Enforcement of the Housing Code for the City of New Haven, County of New Haven, a municipal corporation and governmental subdivision of the State of Connecticut, is all a residence of said city and county.

4. Defendant Louis Daniels, is now, and at all times material hereto was, duly appointed, employed and acting policeman of the City of New Haven, County of New Haven, a municipal corporation and governmental subdivision of the State of Connecticut, is also a residence of said city and county.

5. Defendant Joseph Toscano, is now, and at all times material hereto was, duly appointed, employed and acting as a investigator for the State's Attorney Office for the Superior Court, Judicial District of New Haven, a governmental subdivision of the State of Connecticut, a residence of East Haven and said county.

6. Defendant Eileen M. Ruotolo, is now, and at all times material hereto, duly appointed, employed and working as Clerk and Notary Public in the State's Attorney Office for the Superior Court, Judicial District of New Haven at New

Haven, a governmental subdivision of the State of Connecticut, is also a residence of East Haven and said county.

7. Defendant Earl I. Williams, is now, and at all times material hereto, is an attorney at law, duly admitted and engaged in the practice of law, in all the courts in the state of Connecticut.

8. Each and all of the acts of the defendants alleged herein were done by the defendants, each of them, not as individuals, but under the color and pretense of the statutes, regulations, ordinances, customs and usages of the State of Connecticut, City of New Haven, County of New Haven, and under the authority of their offices Director of Inspection and Enforcement of the Housing Code, policeman, investigator, clerk and notary public for said city, county and state and practicing attorney in the State of Connecticut.

9. This action arises under the United States Constitution, particularly under provisions of the First, Fouth, Eighth and Fourteenth Amendment to the Constitution of the United

States and under federal laws, particularly the Civil Rights Act, Title 42 of the United States Code, Sections 1983, 1985(3) and 1986.

10. This court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Section 1343.

11. The herein alleged acts by all the defendants were committed with the knowledge, consent and approval of each of them.

SECOND COUNT (as to Defendant Peter Durante)

1. Plaintiffs were in the wholesale business selling groceries and sudry products to mon and pops retail stores in the New Haven area.

2. Mr. Andres Rodriguez dba Rodriguez Grocery Store, 142 Putnam Street, New Haven.

3. The plaintiffs sold said owner groceries, on or about the early part of the year 1972.

4. From that year and until June 30, 1982, plaintiffs sold him groceries, when Louis Vitale was hired to handle tenants' complaints, provide materials and check repairmen doing the repairs to the seven pieces of properties owned by Mrs. Elizabeth G. Rodriguez.

5. On or about the month of October, 1982,

tenant, without permission, broke open one of the sewer pipes to connect her washing machine to allow the water to enter the sewer system.

6. The tenant failure to properly install the connection from the washing machine led to all the sewer flushed from the toilets into the cellar.

7. That the smell from the sewage filling the cellar became unbearable that the tenant filed a complaint with the inspection and enforcement department of housing for the City of New Haven.

8. Thereafter, defendant sent inspector McBride to the house located at 9-11 Hurlburt Street, New Haven, to check out the complaint.

9. Said inspector cited the owner for nine housing violation after the inspection of said property.

10. From that day, in October, 1982 until March 31, 1983, said inspector continue to harass the plaintiff Louis Vitale.

11. Said plaintiff went to the office of the defendant, 200 Orange Street, New Haven to discuss the harassment of his employee.

12. During this period of time and without any tenant's complaint, proceeded to cite 131 Lamberton Street, for various housing violations.

13. Plaintiff discuss said property complaint and the constant damages committed during this period by tenants and their visitors.

14. The defendant refuse to listen to plaintiff's complaint.

15. On March 31, 1983, plaintiff sent the defendant a letter that I was retiring from the position of agent for service.

16. On May 2, 1983, plaintiff received a notice from Joseph B. Clark, Deputy Assistant State Attorney (presently a judge) that an application for my arrest have been made to this office, alleging violations of the housing code of the City of New Haven at the building owned by me at 9-11 Hurlburt Street, New Haven and to appear to the Housing Court, 121 Elm Street, New Haven on May 5th, 1983 at 10:00 A.M.

17. As soon as plaintiff received this notice I went to defendant office and spoke with Assistant Director Eagan that I was quitting my job from the owner of the property Mrs. Elizbeth J.

Rodriguez.

18. On May 5th, 1983, plaintiff wrote to said prosecutor and all the tenants in both piece of property that I no longer work for owner.

19. From that day and until May 20, 1983, plaintiff received a second similar application for my arrest and to appear May 26, 1983, at 10:00 A.M. at the housing court to discuss the violations.

20. On May 21, 1983, plaintiff wrote a second letter to the defendant warning him that I did not own the properties and should he carry out his threat to arrest me that he would be sued.

21. On or about June 14, 1983, plaintiff was arrested for 39 code violations which appeared in the Journal Courier on June 15, 1983.

22. On July 14, 1983, a pretrial was held and plaintiff request the court for the document which Inspector McBride and Eagan threatening the Rodriguezs to sign or his wife would go to jail.

23. The court granted the request but the new Deputy Assistant State Attorney David Gold fail to comply.

24. Not knowing of the change with the Deputy Assistant State Attorney for the Housing Court, on August 8, 1983, plaintiff wrote a letter to Deputy Assistant State Attorney Clark Clark for the document.

25. On August 31, 1983, plaintiff received a notice from the clerk of the court to appear for a hearing at 2 P.M.

26. On said date, said prosecutor asked for a postponement.

27. From that day and until a hearing on November 17, 1983. at 2:00 P.M. when arguments w was to hear plaintiff's Motion to Dismiss, Housing Prosecutor David Gold insist that plaintiff return to work for Rodriguez, accept Acceleration Rehabilitation or go to jail for six months.

28. Plaintiff refused to accept said prosecutor's conditions.

29. At said hearing, said prosecutor told the court he had a jury for the trial to be heard on December 1, 1983 at 10:00 A.M.

30. During the meeting of said date, plaintiff argued for either a postponement or the dis-

missal of the case because the plaintiff have delayed an Hawaii Vacation received as a 46th wedding anniversary from September until December 18, 1983 when the court is closed for the Christmas Holiday and that no way a jury can be picked and a trial be completed by said date.

31. On November 30, 1983, the court granted the motion to dismiss the case against the plaintiff.

32. On the 5th of December, 1983, plaintiff met Prosecutor Gold as I was leaving the courthouse, who told me that the case was dismissed without prejudice and threatened the plaintiff not to sue defendant Peter Durante, Eagan and McBride or he would reopen the case again.

33. The complaint and charges was in fact false and there was no reasonable or probable cause for the prosecution.

34. Defendant made the complaint and charge from malice.

35. That the publicity printed in the Journal Courier caused the plaintiffs great humility, disgrace, mental anguish and severe emotional and physical discomfort.

THIRD COUNT (as to defendant Peter Durante)

1. The allegations in paragraphs 1 through 3 of the First Count, are hereby incorporated and made allegations in paragraphs 1 through 3 of the Third Count.

4. That the City of New Haven was having an election for the mayor's office which the Ben Delieto and candidate was invited to attend a landlords' meeting on or about October 20, 1983.

5. On said date, the mayor and his appointed department heads which included the defendant to appear before 300 or more landlords to answer questions concerning the housing code violations.

6. The plaintiff attended this meeting as an owner of property at 381 Orchard Street, New Haven.

7. At said meeting, plaintiff asked the defendant many questions concerning the discriminatory application against the owners of property and accused his employees of aiding the tenants in these buildings to refuse to pay rent by damaging the apartments.

8. Because of these embarrassing questions

and allegation, defendant entered into a conspiracy to injure, oppress, oppress, threaten, intimidation and harassment against plaintiff Louis Vitale because said plaintiff exercise my rights and privileges of freedom of speech secured under the 1st Amendment of the Constitution and laws of the United States.

FOURTH COUNT (as to defendant Joseph Toscano)

1. The allegations in paragraphs 1 through 3 and 5 of the First Count are hereby incorporated and made allegations in paragraphs 1 through 4 in the Fourth Count.

5. Mr. Rodriguez was arrested and charged with the crime of arson for the attempt to burn his store to collect insurance.

6. Said party was buying groceries from a business now owned by my children known as LBG Distributors, Inc., Hamden, Connecticut.

7. On or about May 28, 1983, defendant initiated a telephone call to said company asking for Mr. Rodriguez's invioces concerning purchases of groceries and what relationship Louis Vitale had with said party because said name showed up in various deals with Rodriguez.

8. The party defendant was talking to on the telephone was my son Louis R. Vitale,Jr. who told the defendant that he was referring to the plaintiff and should talk to me.

9. Plaintiff telephone the defendant at approximately 3:30 P.M. which the defendant asked plaintiff many questions.

10. At the end of said telephone conversation, defendant asked the plaintiff where did he want the subpeona sent as a witness for the State of Connecticut against Andres Rodriguez.

11. Plaintiff told the defendant that I will come to his office at 235 Church Street, New Haven and pick up the subpeona.

12. At the time plaintiff picked up the subpeona, the defendant told the plaintiff that he did not intend to use me as a witness.

13. Mr. Rodriguez's Attorney Earl I. Williams heard from the prosecutor that she did not intend to use plaintiff so said counsel contact plaintiff to discuss the conversation I had with the defendant.

14. On June 6, 1983, plaintiff Louis Vitale testified for the defendant Andres Rodriguez

concerning the tax reports, profits from the business, where the records were kept, security of the store and surrounding area and the removal of the beer permit.

15. Nome of the testimony which plaintiff had to offer did not have any important for the conviction of said party.

16. During plaintiff testifying on the witness stand is when the plaintiff discovered that the defendant taped the telephone conversation without advising me and without a court order.

17. As soon as the court recess, plaintiff told the defendant that he had no right to tape our conversation which led to the defendant threat to arrest me for arguing with him.

18. The defendant illegal taping of the telephone conversation was the invasion of plaintiff's privacy in violation of the state, federal laws and under the Fourth Amendment of the Constitution of the United States.

FIFTH COUNT (as to defendants Durante, Toscano, Ruotolo and Daniels)

1. The allegations in paragraphs 1 through 6, of the First Count and paragraph 8 of the Third

Count, are hereby incorporated and made paragraphs 1 through 7 of the Fifth Count.

8. Defendant Durante failure to obtain a conviction of the plaintiff in the housing court sent a housing inspector to inspect my property at 381 Orchard Street, New Haven for housing code violation.

9. Although the plaintiff permitted ,the inspector to inspect said property, I told him that the city had no right to do so because it was Section 8 tenant and I was a cosponsor of this chinese family from Vietnam and that defendant Durante should stop harassing me.

10. In furtherance of this unlawful conspiracy said defendant procured the defendants Joseph Toscano, Eileen M. Ruotolo and Louis Daniels to obtain plaintiff Louis Vitale arrest for perjury.

11. On December 14, 1983, defendant Joseph Toscano complained and stated to Deputy Assistant State Attorney Robert J. Devlin for the Superior Court, Judicial District of New Haven at New Haven, that on June 6, 1983, that said plaintiff, as a witness for Rodriguez during

the State of Connecticut v. Rodriguez on the charge of Aiding and abetting Arson, First Degree, 113 Putnam Street, committed perjury on one (1) count, in violation of Section 53a-156 in the following way:

a) That the plaintiff denied said defendant that the only way that the beer permit could be moved was to burn 113 Putnam Street, during our telephone conversation.

b) That the plaintiff changed his testimony claimed in the transcript that I change my testimony that I did admit paragraph (a) to the defendant.

12. As a result of this false and distorted statement taken from the illegal taped telephone conversation, taped out an illegal warrant, unsigned by the defendant, forged by defendant Louis Daniels and acknowledged by defendant Eileen M. Ruotolo without witnessing who signed the warrant to secure the plaintiff's arrest for perjury.

13. On December 13, 1983, plaintiff received a telephone call from Detective DeNuzzo to report to him at the fire house on Olive Street, New Haven, because he had a warrant for my arrest for perjury.

14. Plaintiff went to Colonial Bank to obtain a bank check in the name of the New Haven Police for $5000.00 to post bond for my release as soon as the police complete booking the plaintiff.

15. Plaintiff, also, had cash of $450.00 dollars or more in my pocket when I went to the fire house to meet DeNuzzo.

16. Said detective was not there and had the Fire Marshall in charge of the Arson Division to escort plaintiff to the police station.

17. Arriving at the police station, plaintiff was turned over to the officers on duty to be process with the empting all of my pockets, finger printed, photograph of my person and stripped of my belt by the personnel in the employment of the police department of the City of New Haven, State of Connecticut, which said personnel were using facilities owned and maintained by the city for the use and benefit of its police department.

18. Completing the booking of the plaintiff, at 3:10 P.M. I was advised of my rights and than imprisoned in a locked jail cell until I

made bail for $1000.00 and released at 8:10 P. M. in the evening.

19. At no time was plaintiff permitted to make bail, post bond or be released on my cognzance during all of said period of my detention and all had jurisdiction to admit an arrest person to make bail.

20. At no time during the period of said detention was plaintiff permitted to contact my family or friends or attorney to inform them of my where abouts or obtain the assistance of counsel.

21. As defendant Louis Daniels was completing the papers for the plaintiff release on bail, when he shouted in a loud voice to his Supervisor Sargeant Eagan that the warrant was unsigned and what should he do.

22. Said sargeant reply to said defendant to sign Joseph Toscano name to the warrant.

23. During the signing of the bond paper, plaintiff was told to appear in Court December 23, 1983 at 10:00 A.M. or forfeit the bond.

24. Plaintiff told the officer that I was leaving for a Hawaii Vacation on Sunday and to set

a date for the court appearance until after the holidays but the officer refused to change the date.

25. Plaintiff protest that the procedure for when a court appearance was the prerogative of the party arrested and not his to make.

26. The officer refused to change the date which caused plaintiff to contact defendant Earl I. Williams to obtain me a postponement until I return from my vacation to discuss this matter with said defendant.

27. The illegal arrest caused by the defen dants was committed to prevent or spoil the plaintiffs Hawaii Vacation which cost $4000.00.

28. The acts herein alleged were committed either on the instruction of defendant Peter Durante, or with the knowledge or consent of said defendants, or were thereafter approved and ratified by said defendants.

29. The aforesaid acts of defendants were done wilfully, maliciously, and with callous and recklessly indifference to the plaintiffs emotional and mental axiety during our vaca-tion because this serious charge of perjury.

30. At the time of the event alleged herein, plaintiff did not commit perjury or the prosecutor or the defendant Joseph Toscano would not have waited until December 14, 1983 to arrest plaintiff.

31. The conduct of defendants, and each of them, deprived plaintiff of the following rights, privileges and immunities secured to me by the Constitution of the United States.

SIXTH COUNT (as to defendant Louis Daniels)

1. The allegations in paragraphs 1 through 6 of the First Count, are hereby incorporated and made paragraphs 1 through 6 of the Sixth Count.

7. After completing the booking of the plaintiff, defendant than imprison me in a locked jail cell from 3:10 o'clock P.M. on sais date until 8:10 o'clock P.M., 1983.

8. At no time was plaintiff Louis Vitale permitted to make bail, post bond or be released on my cognizance, contact his family, friends or attorney to inform them of my where abouts.

9. This wilfull and malicious action caused my wife and family mental exiety and emotion- distress.

10. Defendant is guilty of misconduct under the law in the performance of his duty and is liable to the plaintiffs injury for all or part of the damages sustained.

11. The plaintiffs suffered and will continue to suffer great mental anguish and emotion, humiliation, inconvience, strain and injury by reason of the worry, fear and consternation caused by the acts of said Defendant Louis Daniels.

12. The plaintiffs claim double damages caused by defendant's forgery of the warrant for the plaintiff arrest.

SEVENTH COUNT (as to defendant Eileen Ruotolo)

1. The allegations in paragraphs in paragraphs 1 through 6 of the First Count, are hereby incorporated and made paragraphs 1 through 6 of the Seventh Count.

7. On or about December, 1983, defendant Eileen M. Ruotolo was a Notary Public, working in the office of the State Attorney, authorized by the laws of the State of Connecticut to take proof of acknowledgement of which by law had to be made in an affidavit of an arrest warrant.

8. On or about December 14, 1983, defendant certified that defendant Joseph Toscano signed and acknowledge the allegations in an affidavit of an arrest warrant against the plaintiff Louis Vitale.

9. That defendant signed her name to the affidavit that said defendant appeared before her and acknowledge to the truth of the allegations in the warrant.

10. That said defendant never executed the instrument.

11. The certification and statement by defendant Ruotolo is false.

12. The defendant is guilty of misconduct in the performance of her powers and liable to the plaintiffs for all the damage sustained.

13. The plaintiff has suffered in time and money in the prosecution of this lawsuit.

14. The plaintiffs suffered and will continued to suffer great mental anguish, humiliation, inconvience, strain an injury by reasons of worry fear and consternation caused by act of the defendant.

15. By reasons of the above, by the false

certificate of acknowledgement and misconduct of the defendant and under the provisions of the law, defendant has become indebted to the plaintiffs.

EIGHTH COUNT (as to defendant Earl I. Williams)

1. The allegations in paragraphs 1 through 11 of the First Count, are hereby incorporated and made allegations 1 through 11 in the Eighth Count.

12. The defendant received information from the prosecutor that plaintiff was subpeona to testify for the State of Connecticut v. Rodriguez and she did not intend to use the plaintiff because he could be of no help to convict Mr. Andres Rodriguz.

13. Defendant contact said plaintiff and for twice or three times a day until I testify as to the conversation I had with defendant Toscano and my connection with said party.

14. On June 6, 1983, plaintiff appeared as a witness for the defendant Andres Rodriguez.

15. After the completion of my testimony in the trial, plaintiff never heard from defendant Toscano or Asst Prosecutor until I was serve a

warrant for my arrest on December 16, 1983 for perjury.

16. On or about December 17, 1983, plaintiff contact defendant and told him that I was arrested for perjury, had to appear in court on December 19, 1983, to have the court appearance postpone until after the holiday because I was going to Hawaii vacation leaving on Sunday.

17. On or about January 5, 1984, plaintiff Louis Vitale met with defendant at his office to discuss the charge of perjury against me when plaintiff testified for his client Mr. & Mrs. Rodriguez.

18. During this conversation and many times thereafter, defendant led the plaintiff believe that he intended to sue the prosecutor and defendant Toscano as soon as I receive a discharge of the charge of perjury by the court, which he knew that the statement was false.

19. Also during said conversation plaintiff told the defendant to obtain a copy of the subpeona and warrant becaused it was signed by defendant Louis Daniels at the time I post a bond.

20. Whenever the defendant had to appear in

court to file or argue motions, plaintiff was always present before defendant who always handling several other criminal cases before he appeared to tell me that the case was postponed.

21. During many of these appearances and postponement, plaintiff had to wait many hours and thereafter chauffeur defendant to airports, courts and the state prison.

22. On or about February 2, 1984, defendant asked the plaintiff if I would give him a loan of $1000.00 to establish a client fund because defendant severed his partnership with Attorney David Goldman.[1/]

23. Plaintiff told the defendant that I would have to discuss matter with my wife because she control all the money.

24. From January 5, 1985 until February 7, 1985, plaintiff assist defendant with the investigation concerning the illegal acts of the defendants Peter Durante, Joseph Toscano, Louis

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1/ Eighth Count, App.A, para. 17 p-24 should should be 23 and continue on to the end of the Count.

Daniels and Eileen M. Ruotolo, case research and zeroxing the transcript provided by the prosecutor's office of the State Attorney.

25. Plaintiff told the defendant to file motions to get copies of the tape concerning the telephone conversation with defendant Toscano.

26. During said time, defendant did file several motions with no response from the prosecutors' office and made no effort to obtain the tape which was very important to plaintiff defense.

27. On August 3, 1984, plaintiff wrote to the Chief of Police complaining of the cruel and unusual punishment and a request for the officer's who forged the defendant Joseph Toscano name to the warrant.

28. On August 13, 1984, plaintiff wrote Honorable Judge Frances R. Quinn who signed the warrant, which letter was never answer.

29. On October 1, 1984, plaintiff wrote to Sargeant Bereton to co-operate with me to provide the officer's name and hand writing.

30. On October 24, 1984, plaintiff wrote the Chief of Police a second time for the officer's

name which was not supplied as yet.

31. On November 2, 1984, plaintiff received a letter from Commander Kenneth Cruz, Internal affairs Unit of the New Haven Police Department which he supplied me the Officer's name who signed the warrant for my arrest the evening of December 16, 1983.

32. On November 30, 1984, plaintiff replied to said commander.

33. On December 15, 1984, plaintiff wrote to Chief State Attorney Austin J. McGuigan which no reply was sent to me about my complaint.

34. Plaintiff presented the letter from Commander Kenneth Cruz that Louis Daniels signed defendant Joseph Toscano name to the warrant and acknowledged by defendant Eileen M. Ruotolo I told the defendant to move to dismiss the case as soon as possible.

35. Defendant reply was that there was no forgery and no violation of the acknowledgement of the warrant and refuse to act against the defendants or push for a dismissal of the case which having great mental axiety and severe emotional strain with the plaintiff and our

family.

36. From November 2, 1984 until on or about February 7, 1985, plaintiff told the defendant on many ocasions in his office and court halls to carry out my instruction to end the case.

37. Defendant refused to follow my instruction that on or about February 7, 1985, plaintiff asked for the file and I filed my appearance slip to defend the criminal trial pro se.

38. Plaintiff told the defendant to withdraw his name by filing a withdrawal slip to the court to remove himself from the criminal trial.

39. From that date until the dismissal of the criminal case, defendant did not file his withdrawal from the case, continue to discuss the case behind my back and appeared upon request by Judge Murray, Monday July 1, 1985, at 10:00 a.m., 235 Church Street, New Haven.

40. From that date to the date of the trial, plaintiff filed several motions to the court which was never acted upon by the court.

41. On said date, defendant conspired and approved Judge Murray's referring plaintiff to the Court Consultation Clinic for a competency.

evaluation whether I understood serious charge of perjury whether I am capable of understanding the proceeding, assist in my defense or of defending myself in a long criminal trial.

42. Plaintiff received notice to appear in court on September 9, 1985 before Judge Murray at 10:00 a.m.

43. On said date, present in court for the trial, defendant, Deputy Assistant State's Attorney Michael F. Lawlor, Mrs. Deborah Scott, ACSW, Court Consultantation Clinic and the plaintiff Louis Vitale.

44. After a brief trial with the only party to testify against the plaintiff, Mrs. Deborah Scott for the State of Connecticut, which a copy of shocking report was entered as an exhibit into the court, the case was dismissed against the plaintiff.

45. That the defendant joined a conspiracy with defendants Peter Durante, Joseph Toscano, John Does in the State's Attorney Office, all the judges hearing the judges hearing the perjury charges against the plaintiff and the clinical team for the Court Consultation Clinic

to perpetrate a fraud against the plaintiff Louis Vitale.

46. Because perjury is a felony carrying a Five (5) year sentence and $1000.00 fine, this serious charge could not be heard in B Court.

47. That all the judges and Deputy Assistant State's Attorney were handling minor criminal cases with prison sentence of one year or less with a fine of $1000.00 or less, where said court personnel:

48. That plaintiff perjury trial was never transferred from B to the A Court of the Superior Court.

49. At the direction of the defendants, plaintiff was forced, without my consent, to undergo a competence test to stand trial examination and the understanding of the perjury charge against me.

50. The conduct of the defendants and each of them, degrading and humiliating action against the plaintiffs cause mental anguish and severe emotional and physical disconfort.

51. The conduct of the defendants and each of them deprived plaintiff of the following

rights, privileges and immunities secured to me by the Constitution of the United States.

52. The acts, conduct and behavior of defendants, and each of them, were performed knowingly, intentionally and maliciouly against the plaintiffs.

53. The rights of plaintiff against cruel and unusual punishment is a violation of the Eighth Amendment to the Constitution of the United States.

NINTH COUNT (as to defendant Earl I. Williams)

1. On february 9, 1984, defendant barrowed $1000.00 from the plaintiff Grace Vitale, to open a client trust Fund.

2. The defendant promised to pay within a reasonable time or soon as he settle a civil lawsuit which is reaching the date of the trial.

3. On October 10, 1986, Plaintiff Grace Vitale asked defendant for the payment due for $1000.00.

4. Defendant did raise ridicules claims against paying his debt owed the plaintiff.

5. On October 20, 1986 plaintiff demand pay-

ment of the money.

6. Defendant refused to pay.

TENTH COUNT (as to defendant Earl I Williams)

1. Plaintiff helped and testified for the defendant in the trial for his client Mr. Rodriguez and he has not paid plaintiff.

2. That the defendant never sent plaintiff any statement for legal fees for handling the perjury trial.

3. Plaintiff asked the defendant to sent me a bill.

4. Defendant told the plaintiff that there was no charge.

5. Plaintiff rendered services, seven cases of orange juice, testimony fees for the approximate sum of $1500.00.

6. That the defendant improper and fraudulence handling of the perjury trial, he is not entitled to be paid a legal fee.

7. Plaintiff asked defendant for the money owed to me.

8. Defendant refuse to pay the same.

ELEVENTH AMENDMENT (as to all the defendants)

1. The allegations in paragraphs 1 through 11

in the First Count, are hereby incorporated and made paragraphs 1 through 11 of the Eleventh Count.

12. Plaintiff as a witness in a civil or criminal trial is a protective class under Title 42 U.S.C.A., Section 1985(3).

13. There has not been any other party in the State of Connecticut or the United States of America.

14. These defendants joined a conspiracy to invidious discriminatory animus to oppress, injure, harm and punish the plaintiff for exerting his right of freedom of speech under the First Amendment to the Constitution of the United States for critizing defendant Durante during the election year for mayor of the City of New Haven.

15. By reasons of the conduct of defendants, and each of them, fail to exercise their power to aid in the prevention of the violation of the plaintiff of the following rights, privileges and immunities secured to me by the Constitution of the United States.

16. Each of the defendants, individually and in concert with the others, acted under pretense and color of law and his official capacity but said acts were beyond their scope of jurisdiction and without authorization of the law, and each defendant, individually and in concert with the others, acted wilfully, knowly, and with specific intent to deprive plaintiff Louis Vitale to freedom of speech, cruel and unsual punishment, invasion of privacy and freedom from unlawful arrest, detention and imprisonment, all of which rights are secured to said plaintiff by the First, Fourth, Eighth and Fourteenth Amendment to the Constitution of the United States and by Title 42 United States Code, Sections 1983, 1985(3) and 1986.

17. Plaintiff Grace Vitale suffered mental anguish and severe emotional and physical distress because of the cruel and unusual punishment of plaintiff Louis Vitale, which caused the loss a consortium relationship which was a violation of plaintiff constitutional protective rights.

Wherefore, plaintiffs claim damages against defendants, and each of them, as follows:

1. For $500,000.00 as compensatory damages;
2. For $500,000.00 as punitive damages;
3. For of suit and pro se fees; and
4. For such other and further relief as the court may deem proper.

THE PLAINTIFFS '

BY _____
LOUIS VITALE, PRO SE

BY _____
GRACE VITALE, PRO SE

CERTIFICATION

I hereby certify that the foregoing motion was mailed, postage prepaid, January 27, 1987, to: Carolyn R. Spencer, Assistant Corporation Counsel, 770 Chapel Street, New Haven, Connecticut 06510; Joseph Toscano, Career Criminal Division, Chief State's Attorney Office, P.O. Box 1964, New Haven, Connecticut 06509; Eileen M. Ruotolo, 40 Salton Place, East Haven, Connecticut 06512 and Earl I. Williams, Esq., 129 Church Street, New Haven, Connecticut 06510.

Louis Vitale

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : N-86-400 (EBB)

PLAINTIFFS :

v. :

CITY OF NEW HAVEN, ET AL :

DEFENDANTS : APRIL 7, 1987

RULING ON DEFENDANTS' MOTION TO DISMISS

Plaintiff, Louis Vitale, proceeding pro se, brings this action under U.S.C. §§ 1983, 1985 (3) and 1986 seeking damages against the City of New Haven, Peter Durante, Director of Building Inspection and Enforcement for the City of New Haven, Patroman Louis Daniels of the New Haven Police Department, Joseph Toscano, investigator for the Connecticut States' Attorney's office, Eileen M. Ruotolo, former clerk and Notary Public in the Connecticut State's Attorney office and Attorney Earl I. Williams. Plaintiff alleges that defendents, individually and as co-conspirators, deprived plaintiff of his constitutional rights protected by the First, Fourth Eignth and Fourteenth Amendments to the United

States Constitution.

Each of the defendants has moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. For the reasons stated below, these Motions to Dismiss must be granted.

FACTS

Plaintiff Louis Vitale was arrested on June 14, 1983, for thirty-nine violations of the New Haven Housing Code. Six months later the plaintiff was again arrested for perjury on the bases of his testimony in a state court arson trial. The circumstances surrounding these two arrests form the gravamen of plaintiff's present complaint.

Prior to March 31, 1983, plaintiff was employed as building manager for several pieces of property owned by a Mrs. Elizabeth G. Rodriguez. It was in this capacity apparently that plaintiff was arrested on June 14, 1983, for housing code violations existing on the Rodriguez property. Tis case was dismissed on November 30, 1983, although plaintiff claims that publicity about the case in the New Haven Journal Courier

caused the plaintiff "great humility, disgrace, mental anguish and severe emotional and physical discomfort." (Am. Complaint, p-6).

The events events surrounding plaintiff's second arrest began on May 28, 1983, when plaintiff returned a telephone call to defendant Joseph Toscano, an investigator for Connecticut State's Attorney's Office. The conversation centered on plaintiff's relationship with Andres Rodriguez, who the state was prosecuting on a charge of arson. On June 6, 1983, plaintiff testified for the defendant in the case of State of Connecticut v. Rodriguez, and it is the basis of this testimony that plaintiff subsequently arrested for perjury. During the Rodriguez trial plaintiff learned for the first time that his earlier telephone conversation with Investigator Toscano had been taped. Plaintiff claims that after the Rodriguez trial, defendant Peter Durante, the Director of Building Inspection and Enforcement for the City of New Haven, entered into an unlawful conspiracy with defendants Toscano, Ruotolo and Daniels in an attempt to arrest plaintiff for perjury. On

December 13, 1983, plaintiff received a call from Detective DeNuzzo stating that there was a warrant for plaintiff's arrest for perjury, and plaintiff subsequently voluntarily reported to the police station for his arrest.

Plaintiff claims that after the normal booking formalities, he was incarcerated for five hours during which time plaintiff was not permitted to make bail, post bond or obtain the assistance of counsel. When plaintiff was released, he claim he overheard Sargeant Eagan direct defendant Louis Daniels to sign the name of Joseph Toscano to plaintiff's otherwise unsigned arrest warrant.

On December 17, 1983, plaintiff contracted with defendant Attorney Earl Williams to represent plaintiff against the charge of perjury. Plaintiff claims that, in the subsequent months and prior to his court appearance, plaintiff contributed substantial investigative and financial assistance to Attorney Williams. Plaintiff alleges that Attorney Williams mishandled his case and treated plaintiff unfairly.

On July 1, 1983 Judge Murray, presumably the

presiding judge in plaintiff's perjury case, requested that the plaintiff report to the Court Consultation Clinic for a competency evaluation. On September 9, 1985, the case against the plaintiff was dismissed.

DISCSSION

On January 23, 1987, plaintiff filed an amended complaint alleging eleven counts of violations of 42 U.S.C. §§ 1983, 1985(3) and 1986. Although plaintiff does not allege each of the eleven counts against each of the seven defendents, it nevertheless is not entirely clear which counts are alleged against which defendants. All of the defendants have moved for dismissal pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Briefs in support of these motions have been filed by the State of Connecticut, City of New Haven and Attorney Williams.

To determine a motion to dismiss under Fed. R.Civ.P. Rule 12(b) this court must consider all allegations in the complaint as true, and must view all facts in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S.

411,421-22 (1969); Appletree v. City of Hartford, 555 F.Supp. 224 (D.Conn.1983). All reasonable factual inference must be drawn in favor the non-moving party. Miree v. DeKalb County, 433 U.S. 25 (1977); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54,57 (2d Cir.1985).

The Federal Rules of Civil Procedure generally required a plaintiff to plead a "short and plain statement" of his claim for relief. Conley v. Gibson, 355 U.S. 41,47 (1957); Batista v. Rodriguez, 702 F.2d 393,397 (2d Cir.1983). But even though the court liberally construes the complaint, a"hodgepodge of vague and conclusary allegations" rather than particularized fact pleading, is insufficient for allegations of civil rights violations to withstand a 12(b)(6) motion to dismiss. Powell v. Jarvis, 460 F.2d 551,553 (2d Cir.1972). See also Fine v. City of New York, 529 F.2d 70,73 (2d Cir.1975); Angola v. Civilette, 666F.2d 1,4 (2d Cir.1981).

In the present case, the court is mindful that plaintiff is proceeding pro se. Historically federal courts have exercise great tolerance in protecting pro se litigants from inad-

vertent forfeiture of important rights because of their lack of legal training. Update Art, Inc. v. Charnin, 110 F.R.D. 26,38 (S.D.N.Y. 1986) citing Traguth v. Zuck, 710 F.2d 90,95 (2d Cir.1983). Courts typically hold pro se litigants to standards less stringent than those applied to expertly trained members of the legal profession. Bates v. Jean, 745 F.2d 1146,1150 (7th Cir.1984), and pro se pleadings are liberally construed. Haines v. Kerner,404 U.S. 519,520-21 (1972).

By the same token, the right of self-representation is not "a license not to comply with relevant rules of procedure and substantive law," Faretta v. California, 422 U.S. 806,835 n.46 (1975), nor are pro se "litigants exempt from applicable and relevant. Update Art, Inc. v. Charnin, supra at 38. When a pro se litigant floods the court with meritless, fanciful claims, the court has an obligation to protect and preserve the sound and orderly administration of justice. Urban v. United Nations, 768 F.2d 1497,1500 (D.C. Cir.1985).

42 U.S.C. §§ 1985(3), 1986

Plaintiff alleges in his complaint various violations of 42 U.S.C. §§ 1985(3) and 1986. All of the defendants move for dismissal on the grounds that plaintiff has failed adequately to state a § 1985 claim. The court must agree.

To adequately set forth a violation of 42 U.S.C. § 1985(3), a complaint must allege, inter alia, "some racial, or perhaps otherwise class-based, invidiously discriminatory animous behind the conspirators' action...." Griffin v. Breckenridge, 403 U.S. 88,102 (1971). In other words, plaintiff must allege that he or she is a member of some class or group that warrants special federal assistance in protecting their civil rights, and that he or she was discriminated against "because of" his or her membership in that special protected class. Sager v. City of Woodland Park, 543 F.Supp. 282,291 (D. Colo.1982) citing Griffin, supra at 102. Classes which the federal court that found deserve special protection for § 1985(3) purposes include race, gender, national origin, political association and religious affiliation. Sager,

supra at 291-92.

In the present case plaintiff has failed to allege membership in any statutorily protected class. In his complaint plaintiff claims that, as a witness in a criminal proceeding, he is a member of a group that deserves protection under § 1985(3). (Am. Complaint, Eleventh Count, para 12). The court is aware no precedent for this proposition. Nor does the court believe that witnesses in civil or criminal cases comprise the type of class that Congress sought to protect in enacting the § 1985 Legislation. Plaintiff also fail to set fort facts, which, if taken as true, are sufficient to establish that plaintiff was discriminated against "because of" his membership in some protected class.

Because a necessary predicate for a § 1986 action is a valid § 1985 claim, plaintiff's § 1986 claim must also fall. Estate of Walker v. Bridgeport, Civil No. B-85-340 (D.Conn. Oct. 30, 1986). Moreover, because a § 1986 is governed by a one-year statute of limitations, plaintiff's § 1986 claim is necessarily time-

barred. 42 U.S.C. § 1986 (1988).

Accordingly, the court finds that plaintiff has failed to state a claim under §§ 1985(3) and 1986, and defendants' Motion to Dismiss as to these claims are granted.

42 U.S.C § 1983

1. Defendant Attorney Williams

To property state a cause of action pursuant to 42 U.S.C. § 1983, plaintiff must allege (1) action taken under the color of state law, and (2) a resulting deprivation of rights, privileges or imunities secured by the Constitution or federal law. Parrat v. Taylor, 451 U.S. 527 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 330 (1986). In order to establish "under color of law" element, plaintiff's burden, where the defendant is not a governmental entity or official, is to show that defendant's actions were so directed by the state or were so intertwined with the state that the action may be deem to be that of the state. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974).

In the present action, plaintiff as named as

Earl I. Williams, the attorney who represented the plaintiff in state court against the charge of perjury. But plaintiff has failed to set forth any facts that would tend to portray defendant Williams' action as actions of the state. In their capacity as representatives of clients in courts, private counsel do not act under color of state law within the meaning of the Civil Rights Act. Dahlberg v. Becker, 748 F.2d 85 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Vitale v. Snaider, Civ. No. N-86-362 (D. Conn. July 29, 1987).

It is true that a private person may act under color of state law when engaged in a conspiracy with state officials to deprive another of federal rights. Dennis v. Sparks, 449 U.S. 24,27-28 (1980). But in a conspiracy claim under § 1983, the complainant must plead with paricularity the over acts engaged in by the defendant which reasonably related to the claimed conspiracy. Angola v. Civiletti, 666 F.2d 1 4 (2d Cir. 1981); Powell v. Workman's Compensation Board of the State of New York, 327 F.2d 131,137 (2d Cir.1964). Plaintiff simply has not

provided the detailed factual pleading of a conspiracy involving Attorney Williams sufficient to withstand a motion to dismiss.

While the incidents alleged, if true, may support an action in state court, they do not provide a sufficient basis for a federal claim accordingly, Attorney Williams' Motion to Dismiss is granted.

2. Defendant City of New Haven

Plaintiff's § 1983 claim against the defendant City of New Haven also must be dismissed. Under Monell v. Department of Social services 436 U.S. 658 (1978), a municipality made be sued for damages under § 1983 only where the constitutional violations has been committed pursuant to an official policy or custom. 436 U.S. at 690-91. No such policy or custom is alleged by the plaintiff in the present case. Moreover, in Turpin v. Mailet, 619 F.2d 196 (2d Cir.1980), cert. den. sub. nom Turpin v. West Haven, 449 U.S. 1016 (1980). The Second Circuit noted that an "official policy" cannot ordinarily be inferred from a single incident of illegality, such as a first false arrest or

excessive use of force, absent some additional circumstance, id. at 202. See also Singleton v. City of New York, 632 F.2d 185 (2d Cir.1980).

The defendants City of New Haven's Motion to Dismiss is granted.

3. Defendants Joseph Toscano and Eileen M. Ruotolo

In Count Four of the amended complaint, plaintiff alleges that defendant Joseph Toscano, an investigator for the Connecticut State's Attorney's Office, illegally taped a telephone conversation between defendant Toscano and the plaintiff Louis Vitale. Plaintiff further alleges that defendant Toscano made malicious and false statements in an affidavit supporting the arrest warrant for the plaintiff. In Count Seven of the complaint plaintiff alleges that defendant Eileen Ruotolo, a former clerk and Notary Public in the Connecticut State's Attorney's Office, was guilty of misconduct in her duties in that she falsely certified that the defendant Toscano signed plaintiff's arrest warrant affidavit. In Count Eleven plaintiff alleges that all of the defendants conspired

to deprive plaintiff of numerous constitutional rights. Defendants Toscano and Ruotolo moved to dismiss these claims on the grounds, inter alia that the claims are barred by the Eleven Amendment.

For reasons not entirely, clear, plaintiff has chosen to sue defendants Toscano and Ruotolo only in their official capacity.[2] defendants contend that although plaintiff has not named the State of Connecticut as a defendant, by suing defendants in their official conpacity the plaintiff, is in fact, suing the State of Connecticut. Thus, accordingly to defendants, an action for damages against defendants Toscano and Ruotolo is in effect an action for damages against the State of Connecticut, and is thus barred by the Eleventh Amendment. The defendants' statement of the law is correct.

The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984). Precedent dictates that an official capacity suit is, in all respects other

than name, to be treated as a suit against the government entity. Kentucky v. Graham, 473 U.S. 159 (1985). Thus, the Eleventh Amendment immunizes an unconsenting state from suits brough in federal court by its citizens of other states. Edelman v. Jordan, 415 U.S. 651,662 (1974).

The court finds that the Eleventh Amendment bars plaintiff from suing defendants Toscano and Ruotolo in their official capacity as state officiers. Defendants Toscano and Ruotolo's Motion to Dismiss is granted.

4. Defendants Peter Durante and Louis Daniels

In Count Two of his amended complaint, plaintiff alleges that defendant Peter Durante, Director of Building Inspection and Enforcement for the City of New Haven, acted maliciously and illegally with respect to the plaintiff's arrest for housing code violations. Following the dismissal of that case, plaintiff claims that defendant Durante continued to harass the plaintiff, and entered into a conspiracy to deprive the plaintiff of his constitutional rights, including his right to free speech.

plaintiff claims that both defendants Durante and Daniels were members of a conspiracy whose action led to the unlawful arrest of the plaintiff for perjury. Plaintiff also claims that defendant Daniels forged the signature of Joseph Toscano to plaintiff's arrest warrant after plaintiff has already been arrested.

In opposing these claims, defendants argue that all claims based on occurrences prior to January 8, 1984, are barred by a three-year statute of limitation, because defendants Durante and Daniels were served with the complaint in the present action on January 8, 1987. In the alternative, defendants argue that plaintiff has fail to state a claim of and actual constitutional deprivation under § 1983.

Statute of Limitations

Because of the essence of a § 1983 action is an action for injury of personal rights, for purposes of the statute of limitations all civil rights actions are characterized as action to recover damages for injuries to the person. Wilson v. Garcia, 471 U.S. 261,278 (1985). Where, as in § 1983, Congress has not explicitly

provided a time limitation, the courts will look to state law for an appropriate time limit. Given that a civil rights injury is characterized as a personal injury, in an action for violations of 42 U.S.C § 1983 this court will apply Connecticut's three-year general tort statute. Conn. Gen. Stat. § 52-577 (1987): DiVerniero v. Murphy, 635 F.Supp. 1531,1535 (D. Conn.1986); Weber v. Amendola, 635 F.Supp. 1527 (D.Conn.1985).

According to Count Two of plaintiff's amended complaint, plaintiff was first arrested on June 14, 1983, for violations of the housing code. The complaint in the present action was filed on November 17, 1986. Thus, appling a three-year statute of limitations, the court finds plaintiff § 1983 claim time-barred to the extent they rely upon plaintiff's June 14, 1983 arrest.

Plaintiff also claims a deprivation of his first amendment rights on the basis of certain action that allegedly occurred on October 20, 1983. at a public meeting of landlords at the offices of New Haven Mayor Biagio Delieto. To

the extent plaintiff relies on the events of October 20, 1983 as a basis for his § 1983 claim, the court finds the claim time-barred.[3]

Failure to State a Claim

Reading the complaint liberally in deference to plaintiff's pro se status, plaintiff's complaint appears to set forth a claim of false arrest, false imprisonment and malicious prosecution. Because plaintiff was arrested for perjury on December 16, 1983, his subsequent filing of his complaint on November 17, 1986 was timely to the extent the complaint relies on action or events pertaining to the December 16, 1983 arrest.

If plaintiff was arrested pursuant to an arrest warrant valid on its face, the plaintiff's claims of false arrest and false imprisonment must fail. There is no constitutional violation sufficient to give rise to a § 1983 claim if an arrest is based on a lawfully issued warrant. Smith v. Gonzales, 670 F.2d 522 (5th Cir.), cert. denied, 459 U.S. 1005 (1982). There is no constitutional guarantee that only the guilty will be arrested. Baker v. McCollom, 443 U.S.

137, 145 (1979).

But in his complaint, plaintiff alleges that the arrest warrant was not valid. Plaintiff claims that prior to his release on bail, he overheard Sergeant Hagan direct Louis Daniels to sign the name of Joseph Toscano to plaintiff's otherwise unsign arrest warrant.

Assuming all the facts in favor of the plaintiff, it nevertheless is unclear to the court whether the plaintiff is alleging that the arrest warrant was not signed by a judge or magistrate, or that the affidavit supporting the warrant was not signed, or that perhaps something else was not properly signed. Moreover, the police officer who apparently acted on the allegedly invalid warrant, Detective DeNuzzo, is not a named defendant in the present action. Furthermore, plaintiff has not alleged sufficient facts to establish that a conspiracy may have existed between the defendants Durante and Daniels. For all the foregoing reasons, plaintiff has fail to state a claim for false arrest, or false imprisonment, and the court grants defendants' Motion to Dismiss, with leave for

plaintiff to amend his complaint to more adequately plead a deprivation of his Fourth Amendment rights.

To the extent plaintiff's complaint set forth a pendent claim for malicious prosecution, the claim is dismissed, the federal cause of action has been dismissed.

In the Eighth Count of plaintiff's complaint, plaintiff alleges that some and all of the defendants violated his Eighth Amendment right against cruel and unusual punishment. The Eighth Amendment's proscription against cruel and unusual punishment applies only to those convicted of crimes. Ingraham v. Wright, 430 U.S. 651 (1977). Insofar as plaintiff does not claim that he was convicted of a crime, plaintiff's must fail.

CONCLUSION

For all of the foregoing reasons defendants' Motion to Dismiss are granted.

SO ORDERED.

Ella Bree Burns, Chief Judge
United States District Court

Dated at New Haven, Connecticut, this___day of December, 1983.

N O T E S

1. Although both Louis and Grace Vitale are named plaintiffs in the present action, the court, for reason of convience, will use "plaintiff" in the singular, referring to Louis Vitale, except where noted otherwise.

2. Paragraph 8 of the first count of plaintiff's complaint can only be interprete as evincing plaintiff's intent to sue the defendants solely in their official capacity.

> 8. Each and all of the acts of the defendants alleged herein were done by the defendants, each of them, not as individuals, but under the color and pretense of the statutes, regulations, ordinances, customs and usages of the state of Connecticut, City of New Haven, County of New Haven, and under the authority of their offices Director of Inspection and Enforcement of the Housing Code, policeman, investigator, clerk and Notary Public for said city, county and state and practicing attorney in the state of Connecticut.

Plaintiff in his briefs suggests that he intended to sue defendants in their individual capacity, but his complaint has not been so amended. The court will not considered statements in briefs as supplemental pleadings in determining a motion to dismiss. Travelers v. Indemnity Co. v. Arbogast, 45 F.R.D. 87 (W.D.

PA. 1968) ("Counsel will not be permitted to stand upon their briefs as records to support or defeat a motion to dismiss").

3. Although the complaint in the present action was filed on November 17, 1986, defendants apparently were not served until January 7 or January 8, 1987. Defendants argue that January 7 or January 8, 1987, not November 17, 1986, should be the controlling date for computing the three-year limitation period. Such a ruling would require this court to directly overrule its previous ruling in DiVerniero v. Murphy, 635 F. Supp. 1531 (D. Conn. 1986), has defendants readily admit. The court is not persuated that on the facts of the present case DiVerniero should be overruled

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE and GRACE VITALE	)	
	)	
v.	)	CIVIL NO. N-86-400 (EBB)
	)	
CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO AND EARL I. WILLIAMS	)	

J U D G M E N T

This cause came on for consideration on defendants' motion to dismiss before the Honorable Ellen Bree Burns, Chief Judge, United States District Court, and the issues having been duly considered and a Ruling on Defendants Motion to Dismiss having been filed on December 30, 1988, granting the same,

It is ORDERED, ADJUDED and DECREED that judgment be and is hereby entered in favor of the defendants dismissing the plaintiffs' complaint.

Dated at New Haven, Connecticut, this 4th day of January, 1989.

KEVIN F. ROWE

CLERK, UNITED STATES DISTRICT COURT

BY Frances E Consigli
Deputy In Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : NO. N-86-400 (EBB)

VS. :

CITY OF NEW HAVEN, ET AL : JANUARY 27, 1989

NOTICE FOR AN APPEAL

Notice is hereby given that Plaintiffs Louis Vitale and Grace Vitale, hereby appeals to the United States Court of Appeals for the Second Circuit from a final judgment entered in the above-entitled action on January 4, 1989.

January 27, 1989

(S) _____
Louis Vitale, Pro se
162 Standish Avenue
North Haven, Conn.
(203) 239-3430

(S) _____
Grace Vitale, Pro se
162 Standish Avenue
North Haven, Conn.
(203) 239-3430

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of August, one thousand nine hundres and eighty-nine.

PRESENT:

HON. ROGER J. MINER,
HON. FRANK X ALTIMARI,

Circuit Judges,

HON. WILLIAM P. GRAY,

District Judge,

LOUIS VITALE AND GRACE VITALE,

Plaintiff-Appellants,

-against-

Order
89-7282

CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO EILEEN M. RUOTOLO AND EARL I WILLIAMS,

Defendants-Appellees,

UPON CONSIDERATION of this appeal from a judgment entered in the United States District Court for the District of Connecticut (Burns,

Ch.J.), it is hereby

ORDERED, ADJUDGED AND DECREED that the of the District Court be and it is here by affirmed.

Louis and Grace Vitale, pro se, appeal from a judgment of the United States District Court for the District of Connecticut dismissing their amended complaint under the provisions of Fed.R.Civ.P. 12(b). Bearing in mind appellants pro se status, Traquth v. Zuck, 710 F.2d 90,95 (2d Cir.1983), and accepting as true the allegations in their amended complaint, see Jenkins v. McKeithen, 395 U.S. 411,421-22 (1969) we nonetheless find no fault in the district court's disposition.

The Vitales commenced this action on November 17, 1986. Seeking damages, they asserted causes of action under 42 U.S.C. §§1983, 1985(3) and 1986 premised on violations of the first, fourth, eighth and fourteenth amendments. The alleged violations arose in connection with the arrests of Louis Vitale on two occasions--the first on June 14, 1983 for the violations of

* Of the United States District Court for the Central District of California, sitting by designation.

the New Housing Code, and the second on December 13, 1983 for perjury in the in the state arson prosecution of Andres Rodriguez.[1/] The Vitales alleged also that the defendants conspired to deprive them of their rights under the Constitution.

The district court did not err in dismissing the Vitales' section 1985(3) and 1986 claims. The Vitales argue that as a witness in a criminal proceeding, Louis is a member of a class warranting protection under Section 1985(3). For a claim to be viable under this section, however, the plaintiff must allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. Giffin v. Breckenridge, 403 U. S. 88,102 (1971). As a witness, Louis does not belong to a protected class. Since a valid section 1985 action is required for a claim under section 1986 to succeed. See Kaylor v. Fields, 661 F.2d 1177,1184 (8th Cir.1981); Lessman v. McCormick, 591 F.2d 605,608 (10th Cir.1979),

1/ The December 13, 1983 was the date the war was obtain. I was arrested on December 16, 1983.

the latter claim fail too.

The Vitales' section 1983 claim was properly were dismissed also, As to the City of New Haven, the Vitales have not demonstrated that the violations of which they comlain were committed pursuant to an official policy or custom. See Monell v. Department of Social Services, 436 U.S. 658,690-91 (1978); Turpin v. Mailet, 619 F.2d 196,202 & n.7 (2d Cir. 1980), cert. denied, 449 U.S. 1016 (1980). Similarly, the claims asserted against Joseph Toscano, an investigator the Connecticut State Attorney's Office, and Eileen Ruotolo, a former clerk and notary public in that office, are barred by the Eleventh Amendment, as they were sued solely in their official capacities. See Will v. Michigan Dep't of State Police, 109 S.Ct 2304, 2311-12 (1989); Pennhurst State School & Hospital v.Halderman, 465 U.S. 89,101-02 (1987).

The 1983 claims against Peter Durante, the Director of Building Inspection and Enforcement for the City of New Haven, and Louis Daniels, a New Haven Police Officer, must fail as well. Those claims that are based on events

that occurred more than three years prior to the commencement of this suit--namely the alleged violations based on Louis' first arrest and his actions at a public meeting of landlords held on October 20, 1984[2/]--were barred by the pertinent state staute of limitations. See Owens v. Okure, 109 S.Ct 573,576-77,582 (1989). In regard to the violations that are alleged to have occurred within the limitations period --i.e., the events surrounding Louis' arrest for perjury, including his false arrest and false imprisonment claims--the district court properly held that the Vitales had failed to set forth a deprivation of any constitutional right cognizable under section 1983. See Smith v. Gonzalez, 670 F.2d 522,526 (5th Cir.), cert. denied, 459 U.S. 1005 (1982).

The Vitales argue also that Earl Williams, the attorney who represented Louis in the perjury trial, mishandle his case and treated him unfairly. Williams, however, cannot be said to have acted under the color of state law

2/ The date is in err 1984. It should be 1983.

for the purposes of section 1983. Dahlberg v. Becker, 748 F.2d 1084 (1985).

We have considered the Vitales' remaining claims and find them to be without merit.

ROGER J. MINER

FRANK X. ALTIMARI
Circuit Judges,

William P. GRAY
District Judge,

N.B. This summary order will be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LOUIS VITALE, ET AL ; NO. 89-7282

VS. ;

CITY OF NEW HAVEN, ET AL : August 28, 1989

MOTION FOR EXTENSION OF TIME
FOR A REHEARING OR RECONSIDERATION

For an extension of time for a rehearing or reconsideration against the affirmation of Ellen B. Burn's Ruling dismissing the plaintiffs' complaint.

IT IS HEREBY ORDERED that the motion be granted.

September 11, 1989

Roger J. Miner by FRA

Frank X. Altimare

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LOUIS VITALE, ET AL : NO. 89-7282

VS. :

CITY OF NEW HAVEN, ET AL : October 2 1989

MOTION FOR A REHEARING OR
RECONSIDERATION JUDGMENT
OF THE U.S.D.C. BE REVERSED,

For a rehearing or reconsideration affirming Judge Burn's Judgment dismissing the plaintiffs' complaint in violation of the First, Fourth, Eighth and Fourteenth Amendment of the Constitution of the United States.

ORDER

Before: Hon. Roger J. Miner, Hon. Frank X. Altari, Circuit Judges, Hon. William P. Gray, Judge, of the United States District Court, for the Central District of California, sitting by designation.

IT IS HEREBY ORDERED that the motion be denied

ELAINE B GOLDSMITH, Clerk

Date November 20, 1989

APPENDIX B

CONSTITUTION AND STATUTES INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be search, and the person or things to be seized."

3. The Eighth Amendment to the United States Constitution provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment be inflicted."

4. The Fourteenth Amendment to the United S States Constitution provides in relevant part:

> "No state may make or enforce any law which shall abridge the privileges

and immunities of citizens of the United States; nor shall any state deprive any person of Life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. The Civil Rights Act Title 42 U.S.C. § 1983 provides in relevant part:

"Every person who "under color" of any statutes, ordinances, regulations, customs and usages, of any state or territory, subject or causes to subjected, any citizen of the United States or other person within the jurisdiction thereof to rights, privileges or immunities secured by the Constitution and laws shall be liable to the parties injured in an action at law, suit in equity or other proper proceeding for redress."

6. Section 1985(3) provides in relevant part:

"defines the conspiracy to deprive a person or a class of persons of the equal protection of the law or equal privileges and immunities under the laws."

7. Under Section 1, Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part:

"that a lawsuit should be determined on their merits and not on the technicalities in the pleadings."

8. Under Section 3, Fed. R. Civ. P., 28 U.S.C.A. provides in relevant part:

"civil actions commence by filing the complaint with the Court."

9. Under Section 8f, Fed. R. Civ. P., 42 U. S.C.A. provides in relevant part:

> "overly restrictive reading of the complaint as narrowly as possible and drew every inferences adverse to the plaintiff's claims is inconsistant with the mandate that the pleading shall be so construed to do substantial justice."

10. Under Section 12(b)(6), Fed. R. Civ. P. 28 U.S.C.A. provides in relevant part:

> "that a claim shall not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

11. Under Section 18, Fed. R. Civ. P., 28 U. S.C.A. provides in relevant part:

> "encourages the joinder of claims, whether or not they are consistent, and whether they came out of the same set of circumstances or not, This saves court time and also more convienent for the parties."

12. Conn. Gen. Stat. § 52-577 has two subdivisions that provides in relevant parts:

a) "statute of limitation, for a tort violation is limited to three-years from the day the tort is committed."

b) "statutes of limitations for false arrest, false imprisonment and malicious prosecution starts when the person is arrested for the

violation of a criminal statute, the statute of limitation does not begin until the charge is dismissed."

13. Conn. Gen. Stat., § 52-565 provides in relevant part:

> "any person who falsely makes, alter, forges or confeit any document can be sued and collect double damages."

14. Conn. Gen. Stat., § 54-63c-d, provides in relevant part:

> "the person making the arrest may be liable in an action for false imprisonment must be released without detention longer than it is reasonable necessary,"

15. Conn. Gen. Stat., § 54-41r, provides in relevant part:

> "any person whose wire is interrupted disclosed and used in violation of this Chapter or Sections 53a-189, inclusive, shall (1) have a civil cause of action against any person who interrupts, discloses or uses, or procures any other person to intercept, discloses and uses, such communication: and (2) to be entitled to recover from any such person actual damages computed to the rate of $100.00 per day for each day of the violation or one thousand dollars, which ever is higher, punitive damages, and reasonable attorney's feesand other litigation costs reasonable occurred."

Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1249

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

LOUIS VITALE and GRACE VITALE,
Petitioners,

v.

CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO, EILEEN RUOTOLO and EARL WILLIAMS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, JOSEPH TOSCANO AND EILEEN RUOTOLO, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this action for money damages against respondents Joseph Toscano and Eileen Ruotolo in their official capacities as state officers is barred by the Eleventh Amendment to the United States Constitution?

2. Whether the amended complaint failed to state a claim against respondents Joseph Toscano and Eileen Ruotolo under 42 U.S.C. §§ 1985(3) and 1986?

3. Alternatively, whether the claim set forth in Count Four of the amended complaint against respondent Joseph Toscano relating to the taped phone conversation is barred by the statute of limitations?

4. Alternatively, whether the allegations against respondents Joseph Toscano and Eileen Ruotolo set forth in the Fourth, Fifth, Seventh, Eighth and Eleventh Counts of the amended complaint fail to state a claim upon which relief can be granted?

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STATUTORY PROVISIONS

The petitioners have misquoted several rules and statutory provisions at pages A-69 to A-71 of their Appendix.[1] The quotations set forth in items 7 and 9 through 15 of Petitioners' Appendix B bear little resemblance to the actual language of the cited rules and statutes. However, the only misquoted statute which has any relevance to the issues presented by the petitioners is Conn. Gen. Stat. § 52-577 which provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

STATEMENT OF THE CASE

This civil rights action was commenced on November 17, 1986, by *pro se* petitioners Louis and Grace Vitale against the City of New Haven, Peter Durante, Director of Building Inspection and Enforcement for the City of New Haven, Patrolman Louis Daniels of the New Haven Police Department, Joseph Toscano, investigator for the Connecticut State's Attorney's Office, Eileen Ruotolo, Clerk and Notary Public in the Connecticut State's Attorney's Office and Attorney Earl Williams. An amended complaint was filed on January 27, 1987, seeking damages under 42 U.S.C. §§ 1983, 1985(3) and 1986 (the "Complaint"). (Pet. App. at A-1.) The Complaint alleges that the respondents deprived the petitioner Louis Vitale of his constitutional rights protected by the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution. (Pet. App. at A-33.)

With respect to respondent Joseph Toscano, the Fourth Count of the Complaint alleges that on or about May 28, 1983, Mr. Toscano illegally taped a phone conversation

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[1] References to the Appendix attached hereto will be noted by the sign "App." The sign "Pet. App." refers to the Appendix filed with the Petition for Writ of Certiorari.

between Mr. Toscano and Mr. Vitale. (Pet. App. at A-11 to A-13.) In the Fifth Count of the Complaint, the petitioners allege that on or about December 14, 1983, the respondent Toscano made false statements in an arrest warrant charging Mr. Vitale with the crime of perjury and then failed to sign the warrant. (Pet. App. at A-14, A-15.) It is alleged that this arrest warrant was signed by a judge. (Pet. App. at A-25.) It is further alleged that the perjury charges were dismissed on September 9, 1985, following a hearing on the issue of the competency of Mr. Vitale to stand trial. (Pet. App. at A-27, A-28.)

Regarding the respondent Eileen Ruotolo, the Complaint alleges in Count Seven that Mrs. Ruotolo was guilty of misconduct in the performance of her duties in that she falsely certified that respondent Toscano had signed the affidavit on the arrest warrant charging petitioner Louis Vitale with the crime of perjury. (Pet. App. at A-20, A-21.) In the Eleventh Count of the Complaint, the petitioners allege that all of the defendants conspired to deprive petitioner Louis Vitale of various constitutional rights. (Pet. App. at A-33.)

This action was brought against respondents Toscano and Ruotolo solely in their official capacities as state officers. In paragraph 8 of the First Count of the Complaint, the petitioners assert that "[e]ach and all of the acts of the defendants alleged herein were done by defendants, each of them, not as individuals, but under . . . the authority of their offices. . . ." (Pet. App. at A-3.) Respondents Toscano and Ruotolo filed a motion to dismiss the complaint on April 17, 1987. (App. at 1A.) The District Court granted the respondents' motion to dismiss by a Ruling which was filed with the Clerk's office on December 30, 1988. (Pet. App. at A-36 to A-57.)[2] A judgment in favor of the respondents dismissing

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[2] The respondents recognize that there are a number of typographical errors in the Appendix to the Petition including those pages which contain the rulings of the District Court and the Court of Appeals. Since those errors do not change the substance of the rulings, it was felt that the expense of reprinting them herein would not be justified.

the Complaint was entered on January 4, 1989. (Pet. App. at A-58.)

With respect to respondents Joseph Toscano and Eileen Ruotolo, the District Court found that this action for money damages was brought against them solely in their official capacities and was barred by the Eleventh Amendment. (Pet. App. at A-48 to A-50.) The District Court also ruled that the Complaint failed to state a claim against any of the defendants under 42 U.S.C. §§ 1985(3) and 1986. (Pet. App. at A-43 to A-45.)

On January 27, 1989, the petitioners filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. (Pet. App. at A-59.) In the brief which the petitioners filed with the Court of Appeals, they once again expressed their intent that the state itself be liable under 42 U.S.C. §§ 1983, 1985(3) and 1986 for the acts of its agents. The section of the petitioners' appellate brief which addressed the issue of Eleventh Amendment immunity is reprinted in full at pages 3A–6A of the appendix attached hereto. On August 21, 1989, the United States Court of Appeals for the Second Circuit issued its summary order affirming the judgment of the District Court. (Pet. App. at A-60 to A-65.) The petitioners' Motion for Rehearing or Reconsideration was denied on November 20, 1989. (Pet. App. at A-67.)

Having dismissed the Complaint on the above-stated grounds, neither the District Court nor the Court of Appeals decided the issue as to whether the claim set forth in the Fourth Count of the Complaint against defendant Toscano was barred by the statute of limitations. In addition, neither the District Court nor the Court of Appeals found it necessary to rule on whether the Section 1983 allegations contained in the Fourth, Fifth, Seventh, Eighth and Eleventh Counts of the Complaint, as they may pertain to respondents Toscano and Ruotolo, fail to state a claim upon which relief can be granted. These arguments were raised in respondents' motion to dismiss and in respondents' appellate brief as alternative grounds supporting dismissal of the Complaint and are discussed briefly in Section 2 hereof.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS CONSISTENT WITH THE RULINGS OF OTHER COURTS OF APPEAL AND OF THIS COURT.

A. This Action For Money Damages Against Joseph Toscano and Eileen Ruotolo In Their Official Capacity As State Officers Is Barred By The Eleventh Amendment.

In paragraph 8 of the First Count of the Complaint, the petitioners allege that the respondents Joseph Toscano and Eileen Ruotolo were acting at all relevant times, not as individuals, but under the authority of their official positions. (Pet. App. A-3.) In their brief to the Court of Appeals, the petitioners again argued that the state is liable for money damages in suits brought pursuant to the Civil Rights Act of 1871. (App. at 5A.) The petitioners continue to argue in their Petition for Writ of Certiorari that the Civil Rights Act of 1871 abrogated the Eleventh Amendment immunity of the states. (Petition at pp. 15–16.) It is clear both from the language of the Complaint and the arguments advanced by the petitioners that respondents Toscano and Ruotolo were sued solely in their official capacities with the intent to impose liability on the state.

"[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damage action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350

(1945); *see also, Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 101, 104 S.Ct. 900, 908 (1984). The general rule is that the suit is against the sovereign if the judgment sought would expend itself on the public treasury. *Pennhurst,* 465 U.S. at 101, 104 S.Ct. at 908. The Eleventh Amendment, therefore, serves to bar suits for money damages against state officials in their official capacity. *Kentucky v. Graham, supra,* 473 U.S. at 169, 105 S.Ct. at 3107.

The petitioners' claim that § 1983 abrogates the Eleventh Amendment immunity of the states is inconsistent with well-established precedent. In *Will v. Michigan Department of State Police,* ____ U.S. ____, 109 S.Ct. 2304, 2312 (1989), this Court held "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." The decision below affirming the dismissal of this action against respondents Toscano and Ruotolo in their official capacities on the basis of Eleventh Amendment immunity is in accord with the clear precedent established by this Court.

B. The Complaint Fails To State A Claim Under 42 U.S.C. §§ 1985(3) And 1986.

To establish a cause of action for conspiracy under 42 U.S.C. § 1985(3), a complaint must allege, *inter alia,* "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971). In other words, the petitioners must allege that they are members of some class or group that warrants special federal assistance in protecting their civil rights, *Sager v. City of Woodland Park,* 543 F.Supp. 282, 291 (D. Colo. 1982), and that they were discriminated against "because of" their membership in the specially protected class. *Lessman v. McCormick,* 591 F.2d 605, 608 (10th Cir. 1979).

The only class to which the petitioner Louis Vitale claims membership is a group consisting of witnesses in civil or

criminal proceedings. (Pet. App. at A-32.) This is certainly not a sufficiently invidious class to warrant the special protections afforded under Section 1985(3). *See, e.g., United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836-839, 103 S.Ct. 3352, 3360-61 (1983).

A cause of action under 42 U.S.C. § 1986 is dependent upon a valid § 1985 claim. *Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981); *Lessman v. McCormick, supra*, 591 F.2d at 608 (10th Cir. 1979). Since the petitioners failed to state a valid § 1985 claim, their § 1986 claim must also fail. Moreover, a § 1986 claim is governed by that provision's explicit one-year limitation period. Since the petitioners did not initiate their action within one year of any of the acts complained of, their § 1986 claim is time barred.

The ruling of the Second Circuit Court of Appeals in this case concerning the petitioners' section 1985(3) and 1986 claims is fully consistent with the decisions of other United States courts of appeals and of this Court.

II. ADDITIONAL GROUNDS WHICH WOULD HAVE SUPPORTED DISMISSAL OF THE COMPLAINT.

A. The Claim In The Fourth Count Against Joseph Toscano Is Barred By The Statute Of Limitations.

In the Fourth Count of their Complaint, the petitioners claim that Mr. Toscano taped a telephone conversation between himself and Mr. Vitale on or about May 28, 1983. Mr. Vitale further claims that he became aware of the fact that this conversation was taped during the course of his testimony in state court proceedings on June 6, 1983. (Pet. App. at A-11 to A-13.) It is asserted that the taping of this telephone conversation violated Mr. Vitale's right to privacy under federal and state laws and the Fourth Amendment to the United States Constitution. The three-year general tort

statute of limitations set forth in Conn. Gen. Stat. § 52-577 has been held to be the operative statute of limitations in § 1983 actions brought in Connecticut. *DiVernio v. Murphy*, 635 F.Supp. 1531, 1534 (D. Conn. 1986). Both the taping of the phone conversation and Mr. Vitale's discovery thereof occurred beyond the three-year limitations period. Although the lower courts did not deem it necessary to decide this issue, it serves as another basis supporting the dismissal of the Complaint.

B. The Taping Of The Phone Conversations Alleged In Count Four Of The Complaint Did Not Violate Any Rights Secured By The Constitution Or Federal Law.

It is clear from the Complaint that Mr. Vitale voluntarily telephoned Mr. Toscano who he knew to be an investigator with the State's Attorney's Office and freely conversed with him regarding a pending criminal matter involving a Mr. Rodriguez. (Pet. App. at A-11, A-12.) Since Mr. Vitale willingly and knowingly conversed with Mr. Toscano, he cannot claim an unconstitutional invasion of any justifiable privacy interest or expectation simply because the conversation was simultaneously recorded by Mr. Toscano. *See, e.g., United States v. White*, 401 U.S. 745, 751, 91 S.Ct. 1122 (1971). While the lower courts did not reach this issue, it is another alternative basis supporting dismissal of the Complaint.

C. The Complaint Failed To State A Claim Against Respondents Toscano And Ruotolo For False Arrest, False Imprisonment Or Malicious Prosecution.

The primary allegations against respondents Toscano and Ruotolo relating to Mr. Vitale's arrest on perjury charges are contained in the Fifth, Seventh and Eighth Counts of the Complaint. The petitioners allege that the affidavit of Mr. Toscano contained false statements (Pet. App. at A-15); that Mr. Toscano did not sign the affidavit (Pet. App. at A-15);

that Mrs. Ruotolo falsely certified that Mr. Toscano had signed and acknowledged the arrest warrant affidavit (Pet. App. at A-21); that the arrest warrant was signed by a judge (Pet. App. at A-25); that Mr. Vitale was referred to the Court Consultation Clinic for a competency evaluation (Pet. App. at A-27 to A-29); and that the perjury charges were dismissed on September 6, 1985, following a hearing on Mr. Vitale's competency to stand trial. (Pet. App. at A-27 to A-29.)

The Fourth Amendment to the United States Constitution prohibits arrests without probable cause. *Pierson v. Ray*, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219 (1967). An arrest pursuant to a warrant which is valid on its face is not false. *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982), *cert. denied*, 459 U.S. 1005, 103 S.Ct. 361 (1982). The Complaint does not allege that the arrest warrant was invalid on its face or that the arrest was without probable cause. With respect to Mrs. Ruotolo, the petitioners make no claim that she provided any information upon which the arrest warrant was based, that she was in any way responsible for determining whether probable cause existed for the arrest, that she participated in any way in the arrest and booking procedures, or that she was in any way involved in the court proceedings which followed.

In order to establish a state tort claim or a Section 1983 cause of action for malicious prosecution, the petitioner must show that the criminal proceeding at issue was terminated in his favor. *Singleton v. City of New York*, 632 F.2d 185, 194-95 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368 (1981). "Proceedings are 'terminated in favor of the accused' only when their final disposition is such as to indicate the accused is not guilty, Restatement (Second) of Torts § 660, Comments a & b (1977)." *Id.* at 193. A dismissal based on incompetency to stand trial leaves open the question of the accused's guilt, and cannot be claimed to be a termination favorable to the accused. *See, Singleton v. City of New York, supra*, 632 F.2d at 193-95 (dismissal following successful completion of "adjournment period" is not a disposition favorable to the accused); *Lindes v. Sutter*, 621 F.Supp.

1197, 1201 (D.C.N.J. 1985) (successful completion of "pretrial intervention program" does not constitute a favorable termination of proceedings); *Konon v. Fornal*, 612 F.Supp. 68, 70 (D. Conn. 1985) (dismissal following "accelerated rehabilitation program" is not a termination in favor of accused); *Williams v. Page*, 160 N.J. Super. 354, 389 A.2d 1012, 1017 (App. Div. 1978) (dismissal by reason of insanity does not constitute a favorable termination).

These arguments are presented here as alternative grounds in support of the lower court's dismissal of the Complaint. These issues were briefed but not ruled upon by the District Court or the Court of Appeals.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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March 8, 1990

No. 89-1249

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

LOUIS VITALE and GRACE VITALE,
Petitioners,

v.

CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO, EILEEN RUOTOLO and EARL WILLIAMS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF OF RESPONDENTS JOSEPH TOSCANO AND EILEEN RUOTOLO IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Motion To Dismiss 1A

Excerpts From Petitioners' Brief To The United States Court Of Appeals For The Second Circuit 3A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL PLAINTIFFS,	:	CIVIL NO. N-86-400 (EBB)
v.	:	
CITY OF NEW HAVEN, ET AL DEFENDANTS.	:	APRIL 7, 1987

MOTION TO DISMISS

The defendants, Joseph Toscano and Eileen Ruotolo, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, hereby move to dismiss the amended complaint for the following reasons:

1. In that this is an action for money damages against defendants Toscano and Ruotolo in their official capacities as Inspector and Clerk with the Connecticut State Attorney's Office, the suit is barred by the Eleventh Amendment to the United States Constitution.

2. The Plaintiffs' amended complaint fails to state a claim upon which relief can be granted as to defendants Toscano and Ruotolo.

3. The claimed violations under 42 U.S.C. § 1986 are time barred.

4. The claims set forth in Count 4 of the amended complaint are barred by the applicable statute of limitations.

5. To the extent that the plaintiffs are attempting to state a claim for false arrest and/or false imprisonment in Counts 5 and 7 of the amended complaint, the claims are barred by the applicable statute of limitations.

RESPECTFULLY SUBMITTED,
DEFENDANTS
JOSEPH TOSCANO AND
EILEEN RUOTOLO

BY: JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

/s/ Richard T. Couture
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CERTIFICATION OF SERVICE

This is to certify that on the 7th day of April, 1987, a copy of the foregoing Motion to Dismiss was mailed, postage prepaid, to:

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North Haven, CT 06473

Earl I. Williams, Esq.
129 Church St.
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EXCERPT FROM PETITIONERS' BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 89-7282

LOUIS VITALE and GRACE VITALE
Plaintiffs-Appellants

—V—

CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO, AND EILEEN I. RUOTOLO
Defendants-Appellees

BRIEF OF THE PLAINTIFFS-APPELLANTS LOUIS VITALE and GRACE VITALE

LOUIS VITALE, PRO SE
GRACE VITALE, PRO SE

To Be Argued By:
LOUIS VITALE, PRO SE

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The Fourteenth Amendment under the Constitution for the United States was adopted to protect the citizens of each respective state against the violation of their constitutional rights from the employees, agents and the state. The Civil Rights Act, Title 42 U.S.C. §§§. 1983, 1985(2)(3) and 1986 was passed to sue those who violate a citizens' rights is liable for the damages suffered.

The express intent of Congress, with the enactment of the Civil Rights Act of 1871, was the states themselves, as bodies politics and corporate should be embraced by the term "person" in §. 1 of that act.

Monell v. New York City Dept. of Social Services, 436 U.S. at 689-90, held that "(S)ince there is nothing in the "context" of the Civil Rights Act calling for a restricted interpretation of the word "person." The language of that section should prima facie be construed to include "bodies politics" among the entities that could be sued. §. 1983 was enacted as §. 5, of the Fourteenth Amendment (F)ull force and effect and that the prohibitions of that Amendment to be address to the States themselve. *Monell,* 436 at 685 n.45.

Employees of City and State are not immune from suit under the statute relating to civil actions for deprivations for constitutional protected rights on the ground that officials were acting within the scope of their responsibility or performing a discretionary act. *Bunch v. Barnett,* 376 F. Supp. 23 (1973).

§. 1983 would abrogate the Eleventh Amendment sovereign immunity of States to the extent necessary to provide full relief includes compensation for persons injured by a deprivation of federal protected rights and the prevention of abuse of power by those acting under color of state law. *Robertson v. Wegmann*, 436 U.S. 584, 591, 98 S.Ct. 1991, 1996, 56 L.Ed.2d 554 (1978).

Even the Court's today does not dispute the fact that in the phrase "bodies politic and corporate" would certainly refer to the states as being a person. *Heim v. McCall*, 239 U.S. 175, 188 (1915); *McPherson v. Blacker*, 146 U.S. 1, 24, (1892).

(3)

NO. 89-1249

Supreme Court, U.S.
FILED
MAR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LOUIS VITALE AND GRACE VITALE

PETITIONERS,

v.

CITY OF NEW HAVEN, PETER DURANTE, LOUIS DANIELS, JOSEPH TOSCANO, EILEEN I. RUOTOLO AND EARL I. WILLIAMS

RESPONDENTS,

REPLY TO BRIEF OF RESPONDENTS, JOSEPH TOSCANO AND EILEEN I. RUOTOLO, IN OPPOSITION TO THE PETITION FOR WRIT CERTIORARI

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6pp

REPLY TO BRIEF OF RESPONENTS JOSEPH TOSCANO AND EILEEN RUOTOLO IN GRANTING TO THE PETITION FOR WRIT OF CERTIORARI

Pursuant to the Rules of the Supreme Court of the United States, adopted December 5, 1989, effective January 1, 1990, Part III. JURISDICTION ON WRIT OF CERTIORARI, Rule 10, CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI indicate the character of reasons that will be considered:

1.(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The gravamen in determing the granting of a writ of certiorari when the United States

District Court and the United States Court of Appeals for the Second Circuit has decided a federal question in a way that conflicts with applicable decisions of this court.

The lower courts have decided federal questions in a way that conflicts with applicable decisions of this Court when they dismissed the petitioners' complaint on the statute of limitation, fail to state a claim upon which relief can be granted and under the immunities by the Eleventh Amendment to the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. The federal questions herein have been decided below in a way which is not in accord with the applicable decisions of this Court.

A. With the "Sovereign Immunity" of the State of Connecticut under the Eleventh Amendment.

That the lower courts decisions petitioners are barred by the Eleventh Amendment, as they were sued solely in their official capacities, is in conflict with the amended complaint. (Pet. Br. First Count, paras. 5,6,8, p-15).

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1. References to Petitioners' Brief will be noted by the sign "Pet. Br."

It is also in conflict with Civil Rights Act Title 42 U.S.C., §§ 1983, 1985(2,3) and 1986 enacted by Congress and the Supreme Court decisions lowering centuries-old "Sovereign Immunity" barrier to enforce civil rights violations against state and municipal employees or agents. (Pet.Br. pp-15-16).

B. Failure to state a claim

1. Petitioner Grace Vitale

The lower courts dismissed the petitioners' complaint without addressing her claims for mental and emotional stress caused by the intentional infliction of punishment of my husband without probable cause which is conflict with § 1983 which Congress passed to compensate persons injured by the deprivation of a constitutional rights. The Supreme Court also stated that compensation, exemplary and punitive damages. (Pet.Br.pps.-16-18).

2. Petitioner Louis Vitale

The lower courts dismiss petitioners' complaint because I fail to state a claim which relief can be grant for false arrest, false imprisonment and malicious prosecution against

respondents Durante, Daniels, Toscano and Ruotolo in a way that is in conflict with the statory law of forgery and statue of limitation, within the United States and Appeals circuit courts and this court. It also criticize the petitioners' complaint as a "hodgepodge of v vague and conclusory allegations" which many of the paragraphs are required and necessary for the complaint to be viable for a claim for for damages under § 1983. These necessary paragraphs was taken from the form books. (Pet.Br. pps-19-23).

3. Conspiracy

The lower courts has rendered a decision which conflicts within other appeals court alleging that complaint fail to allege sufficient over acts for a conspiracy. (Pet.Br. pps.-24-25).

4. Title 42 U.S.C. § 1983

Since the judgment below was premised on Fed. R.Civ.P. overly restricted reading of the complaint as narrowly as possible and drew every inferences adverse to the petitioners is in conflict with applicable decisions of the

Supreme Court for the following reasons; a) less strigent standard, b) protect important rights and c) liberally and favorably for the petitioners. (Pet.Br.p-25).

The lower courts dismiss the petitioners' complaint against respondent Earl I. Williams for failure to attribute and interwine his action with the state and "in their capacity as representatives of clients in court, private counsel do not act under color of state law within the meaning of the Civil Rights Act", is in conflict with applicable decisions of this Court. (Pet. Br. pps.-26-29).

Finally, the Appeals Court did not support their decision dismissing the petitioners' complain contained in the footenote is in conflict with applicable decisions in this court as to due process and equal protection of the law under the fourteenth Amendment. (Pet. Br. p.-30).

Repectfully submitted,

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